MONTANA ADMINISTRATIVE REGISTER

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The Montana Administrative Register (MAR or Register), a twice-monthly publication, has three sections. The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted. The Rule Adoption Section contains final rule notices which show any changes made since the proposal stage. All rule actions are effective the day after publication of the adoption notice unless otherwise specified in the final notice. The Interpretation Section contains the Attorney General's opinions and state declaratory rulings. Special notices and tables are found at the end of each Register.

Inquiries regarding the rulemaking process, including material found in the Montana Administrative Register and the Administrative Rules of Montana, may be made by calling the Secretary of State's Office, Administrative Rules Services, at (406) 438-6122.

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BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 4.9.401 pertaining to wheat and barley assessment and refunds	)))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On October 27, 2022, at 11:00 a.m., the Department of Agriculture will hold a public hearing in Room 225 of the Scott Hart Building, at 302 N. Roberts in Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The Department of Agriculture will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Agriculture no later than 5:00 p.m. on October 25, 2022, to advise us of the nature of the accommodation that you need. Please contact Cort Jensen, Department of Agriculture, P.O. Box 200201, Helena, Montana, 59620-0201; telephone (406) 444-3144; fax (406) 444-5409; TDD/Montana Relay Service/etc (406) 444-3144; or e-mail agr@mt.gov.

3. The rule as proposed to be amended provides as follows, new matter underlined, deleted matter interlined:

4.9.401 WHEAT AND BARLEY ASSESSMENT AND REFUNDS (1) There shall be levied an assessment of:

(a) ~~20~~ 25 mills per bushel upon all wheat sold in the state of Montana; and

(b) ~~30~~ 35 mills per hundredweight on all barley sold in the state of Montana.

(2) All assessments are subject to refund provided the following criteria are met:

(a) Application for assessment refund shall be in writing on forms provided by the committee.

(i) Forms will be furnished upon application to the Montana Wheat and Barley Committee, P.O. Box 3024, Great Falls, Montana 59403-3024.

(b) Written application for refund of the wheat or barley assessments must be submitted by the first seller of the wheat or barley or by an individual with the first seller's power of attorney.

(c) Refund application forms shall be submitted 30 days after the date of first sale and no later than 90 days from the date of the first sale of wheat or barley for which a refund is filed.

AUTH: 80-11-204, 80-11-205, MCA
IMP: 80-11-205, 80-11-206, MCA

REASON: Wheat and barley growers need to spend more on research and marketing, so an increase is necessary especially in light of inflation.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Cort Jensen, Department of Agriculture, P.O. Box 200201, Helena, Montana, 59620-0201; telephone (406) 444-5402; fax (406) 444-5409; or e-mail cojensen@mt.gov, and must be received no later than 5:00 p.m., November 4, 2022.

5. Cort Jensen, Department of Agriculture, has been designated to preside over and conduct this hearing.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 4 above or may be made by completing a request form at any rules hearing held by the department.

7. An electronic copy of this proposal notice is available through the Secretary of State's web site at http://sosmt.gov/ARM/Register.

8. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rule will significantly and directly impact small businesses. There will be a 25% increase in wheat check-off and a 17% increase in barley check-off.

Cost per Truckload		
	Wheat	Barley
2 Cent/BU, 3 Cent/HWT	$19.34	$17.19
2.5 Cent/BU, 3.5 Cent/HWT	$24.18	$20.06

3-year Rolling Average 2019-2021		
	Wheat	Barley
FY 2021	$4,647,410	$484,709
FY 2020	$4,573,501	$435,923
FY 2019	$3,350,206	$393,323
Average	$4,190,372.33	$437,985.00
Check-off Increase	$5,237,965.42	$512,442.45
Difference	$1,047,593.08	$74,457.45

/s/ Cort Jensen
Cort Jensen
Rule Reviewer

/s/ Christy Clark
Christy Clark
Director
Agriculture

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 2.5.202, 2.5.301, 2.5.603 through 2.5.605 pertaining to department responsibilities, delegation of purchasing authority, small purchases or limited solicitations of supplies and services, sole source procurement, and exigency procurements and the repeal of ARM 2.4.201 and 2.4.202 pertaining to minimum refund and exceptions to minimum refund rule	)	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On August 5, 2022, the Department of Administration published MAR Notice No. 2-5-628 pertaining to the proposed amendment of the above-stated rules at page 1344 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has amended ARM 2.5.202, 2.5.301, and 2.5.603 through 2.5.605 as proposed.

3. The department has repealed ARM 2.4.201 and 2.4.202 as proposed.

4. The department has thoroughly considered the comment received. A summary of the comment and the department's response follow:

COMMENT # 1: A commenter suggested the department retain ARM 2.4.201 and 2.4.202 because the public may use these refund procedures.

RESPONSE # 1: The department appreciates the comment and insight that was provided; however, the department has determined the rule is not necessary because the rule relates only to internal procedures between agencies.

/s/ Don Harris
Don Harris
Rule Reviewer

/s/ Misty Ann Giles
Misty Ann Giles
Director
Department of Administration

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I pertaining to activities requiring a license	)))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On August 5, 2022, the Department of Administration published MAR Notice No. 2-59-630 pertaining to the proposed adoption of the above-stated rule at page 1352 of the 2022 Montana Administrative Register, Issue Number 15.

2. No comments or testimony were received.

3. The department has adopted the above-stated rule as proposed: New Rule I (ARM 2.59.1761).

/s/ Don Harris
Don Harris
Rule Reviewer

/s/ Misty Ann Giles
Misty Ann Giles
Director
Department of Administration

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 2.59.138 pertaining to banking definitions	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Department of Administration published MAR Notice No. 2-59-632 pertaining to the proposed amendment of the above-stated rule at page 1355 of the 2022 Montana Administrative Register, Issue Number 15.

2. No comments or testimony were received.

3. The department has amended the above-stated rule as proposed.

By: /s/ Misty Ann Giles
Misty Ann Giles, Director
Department of Administration

By: /s/ Don Harris
Don Harris, Rule Reviewer
Department of Administration

Certified to the Secretary of State September 13, 2022.

BEFORE THE STATE LOTTERY AND SPORTS WAGERING COMMISSION
DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 2.63.201 pertaining to procedural rules	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the State Lottery and Sports Wagering Commission published MAR Notice No. 2-63-625 pertaining to the proposed amendment of the above-stated rule at page 1357 of the 2022 Montana Administrative Register, Issue Number 15.

2. The commission has amended the above-stated rule with the following changes from the original proposal, new matter underlined:

2.63.201 PROCEDURAL RULES (1) remains as proposed.

(2) The commission adopts and incorporates the public meeting rule of the Department of Administration found in ARM 2.2.102. The rule describes the actions the commission must take to provide adequate notice of a public meeting and provides that meetings may be held electronically or may be recorded.

AUTH: 2-3-103, 2-4-201, MCA
IMP: 2-3-103, 2-4-201, MCA

3. The commission has thoroughly considered the comment received. A summary of the comment and the department's response follows:

COMMENT #1: A commenter encouraged the commission to add a better description of the substance of the rule adopted by reference.

RESPONSE #1: The commission agrees with the comment and has amended the rule accordingly.

/s/ Don Harris
Don Harris
Rule Reviewer

/s/ Leo Prigge
Leo Prigge
Chair
State Lottery and Sports
Wagering Commission

Certified to the Secretary of State September 13, 2022.

BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE
OFFICE OF THE MONTANA STATE AUDITOR

In the matter of the amendment of ARM 6.6.803, 6.6.2707, 6.6.2809, and 6.6.5701 pertaining to Annuities, Periodic Payment of Premium Taxes, and Surplus Lines Insurance Transactions, and Supervision, Rehabilitation, and Liquidation of Self-Funded Multiple Employer Welfare Arrangements	)	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Commissioner of Securities and Insurance, Office of the Montana State Auditor (CSI) published MAR Notice No. 6-271 pertaining to the proposed amendment of the above-stated rules at page 1359 of the 2022 Montana Administrative Register, Issue Number 15.

2. A public hearing was not contemplated or requested. No comments or testimony were received.

3. CSI has amended ARM 6.6.803, 6.6.2707, 6.6.2809, and 6.6.5701 as proposed.

/s/ Kirsten Madsen
Kirsten Madsen
Rule Reviewer

/s/ Ole Olson
Ole Olson
Chief Legal Counsel
Commissioner of Securities and Insurance,
Office of the Montana State Auditor

Certified to the Secretary of State September 13, 2022.

BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE
OFFICE OF THE MONTANA STATE AUDITOR

In the matter of the amendment of ARM 6.6.706 and 6.6.707 pertaining to Life Insurance Illustrations	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Commissioner of Securities and Insurance, Office of the Montana State Auditor (CSI) published MAR Notice No. 6-272 pertaining to the proposed amendment of the above-stated rules at page 1363 of the 2022 Montana Administrative Register, Issue Number 15.

2. A public hearing was not contemplated or requested. No comments or testimony were received.

3. CSI has amended ARM 6.6.706 and 6.6.707 as proposed.

/s/ Kirsten Madsen
Kirsten Madsen
Rule Reviewer

/s/ Ole Olson
Ole Olson
Chief Legal Counsel
Commissioner of Securities and Insurance,
Office of the Montana State Auditor

Certified to the Secretary of State September 13, 2022.

BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE
OFFICE OF THE MONTANA STATE AUDITOR

In the matter of the amendment of ARM 6.10.303 pertaining to Exemptions	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Commissioner of Securities and Insurance, Office of the Montana State Auditor (CSI) published MAR Notice No. 6-273 pertaining to the proposed amendment of the above-stated rule at page 1366 of the 2022 Montana Administrative Register, Issue Number 15.

2. A public hearing was not contemplated or requested. No comments or testimony were received.

3. CSI has amended ARM 6.10.303 as proposed.

/s/ *Kirsten Madsen*
Kirsten Madsen
Rule Reviewer

/s/ *Ole Olson*
Ole Olson
Chief Legal Counsel
Commissioner of Securities and Insurance,
Office of the Montana State Auditor

Certified to the Secretary of State September 13, 2022.

BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE
OFFICE OF THE MONTANA STATE AUDITOR

In the matter of the amendment of ARM 6.6.2804 pertaining to the Collection of Stamping Fee	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Commissioner of Securities and Insurance, Office of the Montana State Auditor (CSI) published MAR Notice No. 6-274 pertaining to the proposed amendment of the above-stated rule at page 1369 of the 2022 Montana Administrative Register, Issue Number 15.

2. A public hearing was not contemplated or requested. No comments or testimony were received.

3. CSI has amended ARM 6.6.2804 as proposed.

/s/ *Kirsten Madsen*
Kirsten Madsen
Rule Reviewer

/s/ *Ole Olson*
Ole Olson
Chief Legal Counsel
Commissioner of Securities and Insurance,
Office of the Montana State Auditor

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 8.94.3727, 8.94.3729, 8.94.3730, and 8.94.3731 pertaining to the administration of the CDBG program	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Department of Commerce published MAR Notice No. 8-94-199 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1372 of the 2022 Montana Administrative Register, Issue Number 15.

2. No comments or testimony were received.

3. The department has amended the above-stated rules as proposed.

/s/ Amy Barnes
Amy Barnes
Rule Reviewer

/s/ Adam Schafer
Adam Schafer
Deputy Director
Department of Commerce

Certified to the Secretary of State September 13, 2022.

BEFORE THE FISH AND WILDLIFE COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 12.5.507 and 12.5.508 pertaining to angling restriction and fishing closure criteria	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On July 8, 2022, the Fish and Wildlife Commission (commission) published MAR Notice No. 12-561 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1131 of the 2022 Montana Administrative Register, Issue Number 13.

2. The commission has amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

12.5.507 ANGLING RESTRICTION AND FISHING CLOSURE CRITERIA

(1) The department shall use the following criteria to determine whether to implement angling restrictions in streams:

(a) angling pressure as determined by the department has the potential to contribute to excessive fish mortality; and

(b) one or more of the following environmental conditions has been determined by the department to exist:

(i) in nonnative salmonid streams designated by the department in the Statewide Fisheries Management Plan, daily maximum water temperatures ~~reach~~ equal to or exceeding 73 degrees Fahrenheit at any time during the day for three consecutive days;

(ii) in cutthroat trout streams designated by the department in the Statewide Fisheries Management Plan, daily maximum water temperature equal to or exceeding 66 degrees Fahrenheit at any time during the day for three consecutive days;

(iii) in bull trout streams designated by the department in the Statewide Fisheries Management Plan, a daily maximum water temperature equal to or exceeding 60 degrees Fahrenheit at any time during the day for three consecutive days;

(iv) stream flows fall to or below the 5th percentile of daily mean values for this day flow level based upon hydrologic records for that water body; or

(v) water conditions meet the criteria for angling restrictions as stated in a drought management plan; or

(c) other biological or environmental conditions such as, but not limited to, water body pollution, disease, or concentration of angling pressure due to other restrictions or closures that the department determines have the potential to contribute to excessive fish mortality.

(2) A fishing closure may be implemented when:

(a) conditions of (1) develop or degrade;

(b) dissolved oxygen is equal to or less than 4 ppm when measured in the early morning before sunrise; or

(c) water conditions meet the criteria for fishing closures as stated in a drought management plan.

(3) An angling restriction or fishing closure may be delayed or may not be implemented by the department if closure criteria are forecast to be met for a short duration.

AUTH: 87-1-301, MCA
IMP: 87-1-301, MCA

12.5.508 REOPENING WATERS (1) Except on waters with a drought management plan, an angling restriction or fishing closure will remain in effect until reopening criteria described in (2), (3), or (4) have been met~~, or until August 31~~.

(2) The department may reopen streams managed for nonnative salmonids when the department determines in its discretion that daily maximum water temperature does not exceed 70 degrees Fahrenheit for three consecutive days.

(3) The department may reopen streams managed for cutthroat trout when the department determines that daily maximum water temperature does not exceed 66 degrees Fahrenheit for three consecutive days.

(4) Streams designated by the department to have bull trout shall remain closed until the following conditions occur:

(a) daily maximum water temperature equals or does not exceed 60 degrees Fahrenheit for three consecutive days; and

(b) when flow regimes provide adequate security habitat.

(5) Reopening waters may be delayed by the department if:

(a) reopening criteria is forecast to be met for a short duration;

(b) conditions on priority waters defined by the department in the Statewide Fisheries Management Plan do not provide adequate security habitat; or

(c) angling pressure due to restrictions and closures on other waterbodies has the potential to contribute to excessive fish mortality.

AUTH: 87-1-301, MCA
IMP: 87-1-301, MCA

3. The commission has thoroughly considered the comments and testimony received. A summary of the comments received and the commission's responses are as follows:

COMMENT #1: All comments received were in support of the intent of the rules. The commission did receive several comments with suggested changes, but all were in support of the objective and purpose.

RESPONSE #1: The commission appreciates the participation and support in this rulemaking process.

COMMENT #2: The commission received several comments in support of amending the rule to include temperature criteria for cutthroat trout streams but stated that 66 degrees is either too high or too low to implement restrictions.

RESPONSE #2: Department of Fish, Wildlife and Parks (department) biologists determined that 66 degrees Fahrenheit was an appropriate threshold for cutthroat trout based on observations that acute mortality occurs at 68 degrees Fahrenheit. Setting restriction criteria at 68 degrees would mean fishing restrictions would not be put in place until lethal water temperatures are reached, meaning that 68 degrees would not be much different from keeping the current 73-degree criteria in place. By implementing restrictions when temperatures meet or exceed 66 degrees for three consecutive days, angling stress is reduced or eliminated before lethal temperatures are reached.

The commission amended the language in ARM 12.5.507(1)(b)(i) from the proposed language to be consistent with the language already contained in the rule. This change is administrative and not substantive.

COMMENT #3: The commission received several comments suggesting alternative temperature criteria for all salmonid fisheries, not just for cutthroat trout or bull trout.

RESPONSE #3: Department data and review of other research indicates that 73 degrees Fahrenheit is an appropriate temperature threshold for non-native salmonid fisheries (e.g., rainbow trout and brown trout). Lowering temperature criteria for these species would unnecessarily limit fishing opportunity prior to undue stress to individual fish from angling. Rainbow trout and brown trout are also more resilient to warmer temperatures than native salmonids.

COMMENT #4: The commission received many comments opposed to adjusting the date the restrictions would remain in effect if the reopening criteria were not met. Some comments proposed having no set date at all.

RESPONSE #4: The commission agrees that establishing a date to reopen streams seems arbitrary and has amended ARM 12.5.508 so that restrictions will be lifted strictly based on temperature and flow conditions.

COMMENT #5: The commission received one comment stating the 66-degree temperature threshold will impact angling crowds and force more boaters into fewer fishable stretches resulting in greater fish mortality in fishable stretches.

RESPONSE #5: ARM 12.5.507(3) allows the department to consider other biological or environmental conditions including the concentration of angling pressure due to other restriction or closures. If shift in angling pressure is deemed to cause increased mortality, then additional restrictions may be implemented.

COMMENT #6: The commission received a few comments stating cutthroat trout would be better protected going to barbless hooks and artificial flies or lures.

RESPONSE #6: The use of barbless hooks or bait limitations would not be expected to have a population-scale influence on fish mortality.

COMMENT #7: The commission received one comment stating special provisions should be applied to the Big Hole River to include no fishing days when the flow is low.

RESPONSE #7: Criteria for drought-related fishing restrictions and closures can be found in the Big Hole Watershed Committee Drought Management Plan (https://bhwc.org/montana/uploads/2022/08/DMP-2022_Final.pdf). As outlined in the plan, fishing restrictions and closures are implemented on defined river stretches depending on water temperatures and flows.

/s/ Kevin Rechkoff
Kevin Rechkoff
Rule Reviewer

/s/ Lesley Robinson
Lesley Robinson
Chair
Fish and Wildlife Commission

Certified to the Secretary of State September 13, 2022.

BEFORE THE FISH AND WILDLIFE COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 12.9.1403 pertaining to grizzly bear demographic objective for the Northern Continental Divide Ecosystem	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On July 8, 2022, the Fish and Wildlife Commission (commission) published MAR Notice No. 12-586 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1135 of the 2022 Montana Administrative Register, Issue Number 13.

2. The commission has amended the above-stated rule as proposed.

3. The commission has thoroughly considered the comments and testimony received. A summary of the comments received, and the commission's responses are as follows:

COMMENT #1: The commission received several comments in general support of hunting grizzly bears. The commission received several comments in opposition to hunting grizzly bears.

RESPONSE #1: The intent of the proposed rule amendment language was not whether hunting would occur or not, but rather to clarify that if hunting were to occur, mortalities related to hunting would count against mortality thresholds, and when hunting would cease if thresholds were exceeded.

COMMENT #2: The commission received several comments that expressed general support for federal delisting of grizzly bears from the federal Endangered Species list. The commission received several comments in opposition to federal delisting of grizzly bears from the federal Endangered Species list.

RESPONSE #2: Whether to delist NCDE grizzly bears is a decision for the federal U.S. Fish and Wildlife Service. The proposed rule amendment language was to clarify that Montana is committed to demographic objectives contained in the NCDE Conservation Strategy if bears are delisted, and that adequate regulatory mechanisms are in place to maintain a recovered population.

COMMENT #3: The commission received several comments that expressed concern about the use of the word "and" instead of "or" in the language of ARM 12.9.1403(5) as it indicates that all threshold objectives must be violated against a six-year running average before additional management action would be taken to further limit mortality and suggest a simple remedy in the language of ARM

12.9.1403 would be to replace the word "and" with the word "or" when listing the threshold objectives.

RESPONSE #3: FWP concurs and has changed the originally proposed amendment language in (5) from "and" to "or."

COMMENT #4: The commission received comments that expressed concerns about the importance of functional connectivity between the NCDE and Greater Yellowstone Ecosystem and that FWP create protective and enforceable requirements for habitat and population management between the NCDE and Greater Yellowstone Ecosystem population of bears.

RESPONSE #4: This rule makes clear the department's commitment to implement the NCDE Conservation Strategy. The demographic objectives contained in the Conservation Strategy (page 49) are to meet the overarching goal "to *maintain a recovered, genetically diverse grizzly bear population throughout the DMA* while maintaining demographic and genetic connections with Canadian populations and *providing the opportunity for demographic and/or genetic connectivity with other ecosystems (CYE, BE, GYE)*." The objectives in the proposed rule will result in conditions conducive to continuing dispersal of subadult bears out of the DMA, providing for potential emigration into other populations or recovery zones. Evidence indicates that dispersal of both males and females is inversely density dependent (Stoen et al. 2006). Subadult bears are more likely to disperse and generally move longer distances from their natal areas when bear density around them is lower. This is likely because at lower densities, dispersing individuals experience less intraspecific competition and are more apt to locate areas where they will have more exclusive access to resources. Consequently, in geographically distinct but expanding populations, we generally observe higher densities and smaller dispersal rates and distances in the "core" and lower densities and larger dispersal rates and distances near the periphery (Swenson et al. 1998, Kojola and Laitala 2000, Jerina et al.2008, Karamanlidis et al. 2021). Interestingly, although male-biased dispersal rates typically result in male-dominated sex ratios near the periphery (Swenson et al. 1998, Kojola and Laitala 2000, Jerina et al. 2008), some evidence suggests that peripheral females and males dispersed similar distances from the core (Swenson et al. 1998, Kojola and Laitala 2000), and all studies documented at least some long-distance female dispersal (Swenson et al. 1998, Jerina et al. 2008, Karamanlidis et al. 2021). These studies all support what has been observed in the spatially expanding NCDE grizzly bear population. Kendall et al. (2009) documented a core-to-periphery density gradient centered in Glacier National Park. We continue to observe outlier bears far from the DMA (and far from other ecosystems). Most outlier verified observations have been males (when sex was determined); however, females appear to be equally present within certain areas of newly occupied range, such as the East Front, the Salish Range, and the Flathead Valley. Through genetic analyses, we have documented several dispersal movements up to 82 miles from the edge of the DMA, by individuals born in the NCDE. Given the protected habitat and the demographic objectives outlined here, we expect that bear density within the DMA will continue to be higher than in

surrounding areas for the foreseeable future. Thus, there will continue to be a density gradient conducive to dispersal outside of the DMA by some subadults. If these individuals are successful in staying out of conflict and surviving in the more human-populated areas between ecosystems, they may succeed in moving between the NCDE and other populations.

COMMENT #5: The commission received some comments that advocated that mortality thresholds in ARM 12.9.1403 must be recalibrated if population estimator methodologies change.

RESPONSE #5: The methods used to estimate the NCDE population result in estimates that are not biased high or low but represent our best estimate of the true population size. The mortality thresholds are not static. They are re-established at least every six years, based on population projections, they are responsive to the current population estimate (whatever it may be), and they are constrained to maintain a 90% estimated probability that the population will stay above 800 bears during the next six years.

COMMENT #6: The commission received a comment expressing concern that the use of a six-year average will result in a lag time that hinders FWP's capacity to detect and respond to significant short-term population changes, undermining the agency's ability to maintain the population above the thresholds identified in the rule.

RESPONSE #6: Our goal of maintaining a 90% estimated probability that the population remains above 800 bears is designed to overcome limitations in our ability to detect population changes. In other words, we are required to maintain a buffer above 800 bears. And this buffer increases if there is more uncertainty in our estimation. The six-year running average for mortality numbers and survival rates is appropriate because it helps smooth annual variation, which is caused by both sampling variance and true variability. Under these objectives, we evaluate population status at least every six years, and then establish new limits consistent with the 90% probability. This makes us very responsive to even small changes in observed values.

COMMENT #7: The commission received a comment that stated current language indicates hunting would not be allowed in a year if mortality thresholds are exceeded. The comment recommends the proposed language in ARM 12.9.1403(5) should be amended to read, "Hunting will not be allowed in a year if mortality thresholds as described in (3)(b)(ii) or (iii) were reached or exceeded in the previous year."

RESPONSE #7: Reaching the threshold does not necessitate closure of hunting. Because this commitment is already conservative, FWP stands by the recommended language.

COMMENT #8: The commission received one comment indicating that the probability threshold of 90% (Hunting will cease if the probability of the population

exceeding 800 falls below 90%) should be higher and suggested 92% or greater. Another commenter suggested the female survival rate threshold in ARM 12.9.1403(3)(b)(i) be increased to 92% to ensure a growing population.

RESPONSE #8: The rule commits to implementing the provisions of the NCDE Conservation Strategy, from which the thresholds in (3) came. The 90% probability threshold and the 90% female survival thresholds are considered adequate to ensure a recovered and stable-to-increasing population.

COMMENT #9: The commission received a comment stating that this rulemaking is getting in front of the USFWS delisting process and should be paused and the commission should not move ahead with rulemaking based on the current conservation strategy.

RESPONSE #9: A criterion for whether a population or population segment should be delisted is whether there are adequate regulatory mechanisms. Codifying the commitments in the Conservation Strategy into ARM prior to delisting demonstrates Montana's commitment to manage grizzly bears at recovered levels if they are delisted and should help the U.S. Fish and Wildlife Service to better evaluate this criterion.

/s/ Zach Zipfel
Zach Zipfel
Rule Reviewer

/s/ Lesley Robinson
Lesley Robinson
Chair
Fish and Wildlife Commission

Certified to the Secretary of State September 13, 2022.

BEFORE THE FISH AND WILDLIFE COMMISSION
OF THE STATE OF MONTANA

In the matter of the adoption of NEW RULE I pertaining to recreational use on the Boulder River	)))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On July 8, 2022, the Fish and Wildlife Commission (commission) published MAR Notice No. 12-587 pertaining to the public hearing on the proposed adoption of the above-stated rule at page 1139 of the 2022 Montana Administrative Register, Issue Number 13.

2. The commission has adopted New Rule I (12.11.619) as proposed.

3. The commission has thoroughly considered the comments and testimony received. A summary of the comments received, and the commission's responses are as follows:

COMMENT #1: The commission received one comment in support of the proposed rule.

RESPONSE #1: The commission appreciates the participation and support in this rulemaking process.

COMMENT #2: The commission received one comment in opposition to the proposed rule stating it restricts recreational use to one set of recreationists and that the commission needs to work with all recreational users when developing recreational plans.

RESPONSE #2: The commission appointed a working group comprised of members which represented multiple recreational perspectives. The work group developed and recommended rule language to the commission. The commission proposed the language for public comment and has adopted it.

COMMENT #3: The commission received one comment concerned about trash in the river due to more people coming to the Boulder River to recreate.

RESPONSE #3: The commission cannot determine whether this rule will affect the amount of recreation on the Boulder River. Section 75-10-212, MCA states that it is "unlawful to dump or leave any garbage, dead animal, or other debris or refuse," and anybody caught doing so may be charged with a misdemeanor.

/s/ Zach Zipfel
Zach Zipfel
Rule Reviewer

/s/ Lesley Robinson
Lesley Robinson
Chair
Fish and Wildlife Commission

Certified to the Secretary of State September 13, 2022.

BEFORE THE FISH AND WILDLIFE COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 12.11.6705 pertaining to extending the implementation date of the Madison River commercial use cap	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On July 8, 2022, the Fish and Wildlife Commission (commission) published MAR Notice No. 12-588 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1141 of the 2022 Montana Administrative Register, Issue Number 13.

2. The commission has amended the above-stated rule as proposed.

3. The commission has thoroughly considered the comments and testimony received. A summary of the comments received, and the commission's responses are as follows:

COMMENT #1: The commission received comments that expressed general opposition to extending implementation of the commercial use cap but did not provide a reason for the opposition.

RESPONSE #1: The commission considered this opposition as part of making its decision.

COMMENT #2: The commission received a comment expressing the opposition to extending implementation of the commercial use cap was based on a concern that there is already too much commercial use on the river, that the use is having detrimental impacts on the user experience (guided and non-guided), and/or impacts on the fisheries, that the amount of use will continue to grow exponentially, and that action needs to occur now. These comments came from commercial and non-commercial users of the river.

RESPONSE #2: The commission noted that the department has not documented impacts to the fisheries from current use levels, but the commission concurs with the importance of ensuring that the resources are protected from overuse. The commission is also interested in the commercial and non-commercial users' experience on the Madison River. The decision to delay implementation of the cap is based on a desire to ensure the public has an additional opportunity to provide input on the work group's recommendations given the importance of the decisions on how best to manage commercial and non-commercial use on the river.

COMMENT #3: The commission received comments opposing the delay to implementation of the cap due to concern that a future commission could eliminate the cap all together.

RESPONSE #3: The commission noted this comment and noted that there is not a proposal to eliminate the cap.

COMMENT #4: The commission received one comment that observed implementing the cap now would help to inform what is an appropriate carrying capacity for the river.

RESPONSE #4: The commission noted that delaying implementation of the cap should not eliminate the opportunity to learn more about the carrying capacity of the river at such time the cap does go into effect.

COMMENT #5: The commission received general comments in support of delaying implementation of the cap until after additional public comment opportunities take place.

RESPONSE #5: The primary purpose for delaying implementation of the cap was to provide additional opportunity for the public to provide input on the work group's recommendations.

COMMENT #6: The commission received comments that were in support of delaying implementation of the cap until such time there is a method for allocating commercial use trips or a comprehensive recreation management plan in place.

RESPONSE #6: The primary purpose for delaying implementation of the cap was to provide additional opportunity for the public to provide input on the work group's recommendations. The commission anticipates that the public comments will help to inform the adoption of an allocation system for commercial use trips and/or a comprehensive recreation management plan.

COMMENT #7: The commission received comments expressing opposition to capping commercial use at all due to the volume of non-commercial use on the river and concern that a cap on commercial use would negatively impact the local economy.

RESPONSE #7: The commission noted that the additional public comment opportunity will help to inform how best to manage non-commercial use on the river and to consider the interests of local businesses.

COMMENT #8: The commission received a comment in support of implementing the cap and work group recommendations but delaying the implementation date until 2024 for the reason that there needs to be additional opportunity for the public to review the recommendations before a final decision is made, and that

implementation part way through the 2023 season would be problematic for the outfitting industry.

RESPONSE #8: The commission noted this concern about potential impacts if the cap was implemented during the middle of the season versus at the start of a season.

COMMENT #9: The commission received a comment that expressed opposition to delaying implementation of the cap based on the amount of time spent by the work group in developing its recommendations and that these recommendations were thoroughly thought through and supported by the outfitting industry, the Fishing Outfitters Association of Montana, the Montana Outfitters and Guides Association, the community of Ennis, and numerous other user groups.

RESPONSE #9: The commission recognized the amount of work done by the work group and the support for its recommendations from various groups. The decision to delay implementation of the cap was based on a desire to ensure the public has opportunity to comment specifically on the work group's recommendations before decisions are made that affect commercial and non-commercial use on the river.

COMMENT #10: The commission received a comment supporting the delay in implementation of the cap for the reason that more consideration of the lower river is needed (downstream from the Greycliff access site), that the non-angling commercial use interests are not represented in the work group's recommendations and should be considered given the low number of non-angling commercial use trips that occur on the lower river.

RESPONSE #10: The commission noted that the additional public comment opportunity enables people to provide input on the work group recommendations as they pertain to the lower section of the river.

COMMENT #11: The commission received a few comments that expressed concern that the proposed rule amendment would eliminate the cap all together.

RESPONSE #11: The commission's decision did not eliminate the cap. The decision was to delay implementation of the cap.

COMMENT #12: The commission received some comments in support of delaying implementation of the cap due to concern that the cap would harm the public who seeks the services of an outfitter, and that capping commercial use could have a negative impact on the local economy.

RESPONSE #12: The commission noted that the additional public comment opportunity will enable people to express input on how the cap might affect people seeking the services of outfitters and potential impacts on the local economy.

COMMENT #13: The commission received comments from the members of the Madison River Work Group that expressed frustration over delaying implementation of the cap but understood the commission's desire to seek additional public input to get this decision right.

RESPONSE #13: The commission noted appreciation for the work group's efforts and their support for seeking additional public input given the importance of decisions affecting commercial and non-commercial use of the river.

COMMENT #14: The commission received a comment expressing concern that a delay in implementation of the cap could result in litigation based on the amount of time that has passed since the historical use days were calculated.

RESPONSE #14: The commission noted this concern but did not see this as a reason for implementing the cap at this time without the benefit of having additional public input on the work group's recommendations.

COMMENT #15: The commission received a comment that expressed support of delaying implementation of the cap was for the reason that more time is needed to consider the impacts on, and interests of, smaller outfitting businesses and those seeking to start a business on the Madison, that the cap could put some smaller outfitters out of business, and that the current proposed system favors the larger outfitting businesses.

RESPONSE #15: The commission noted that the additional public comment opportunity enables people to express input on how the cap might affect smaller outfitting businesses and new outfitters seeking to conduct commercial use on the river.

/s/ Zach Zipfel
Zach Zipfel
Rule Reviewer

/s/ Lesley Robinson
Lesley Robinson
Chair
Fish and Wildlife Commission

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.74.501, 17.74.504, 17.74.505, 17.74.506, 17.74.507, 17.74.508, 17.74.511, 17.74.512, 17.74.513, 17.74.514, 17.74.515, 17.74.516, 17.74.517, and 17.74.518 pertaining to definitions, decontamination standards, performance, assessment, and inspection, performance standards, contractor certification and training course requirements, reciprocity, training provider certification, certified training provider responsibilities, denial, suspension, and revocation of certification, and fees; and the adoption of NEW RULES I, II, and III pertaining to sampling, recordkeeping, reports, and incorporation by reference	)	NOTICE OF AMENDMENT AND ADOPTION (METHAMPHETAMINE CLEANUP)

TO: All Concerned Persons

1. On March 25, 2022, the Department of Environmental Quality published MAR Notice No. 17-417, pertaining to the public hearing on the proposed amendment and adoption of the above-stated rules at page 367 of the 2022 Montana Administrative Register, Issue No. 6. On June 24, 2022, the department published a supplemental notice of proposed amendment and adoption at page 952 of the 2022 Montana Administrative Register, Issue No. 12.

2. The department has amended the following rules exactly as proposed: ARM 17.74.501, 17.74.505, 17.74.506. 17.74.507, 17.74.512, 17.74.513, 17.74.516, and 17.74.518.

3. The department has amended the following rules as proposed but with the following changes, stricken matter interlined, new matter underlined:

17.74.504 DEFINITIONS For the purposes of this subchapter, unless the context clearly indicates otherwise, the following terms have meanings indicated below and are supplemental to the definitions in 75-10-1302, MCA:

(1) "Assessment plan" means a department-approved plan, using sampling to identify the presence or extent of potential contamination of an inhabitable property ~~submitted to the department by a certified methamphetamine cleanup contractor to investigate suspected contamination of inhabitable property, confirm, and evaluate the extent and magnitude of contamination by hazardous chemical residue~~ from the manufacture of methamphetamine or by smoke from the use of methamphetamine. The actions taken to implement this plan include site assessment or final assessment dependent on the timing of the assessment and the

outcome of the sampling.

(2) through (16) remain as proposed.

~~(17) "Site assessment" means the evaluation of inhabitable property by a certified methamphetamine cleanup contractor to determine the nature and extent of contamination from a CML or from smoke from the use of methamphetamine.~~

(18) through (20) remain as proposed, but are renumbered (17) through (19).

17.74.508 CONTRACTOR CERTIFICATION AND RENEWAL (1) An applicant for department certification as a methamphetamine cleanup contractor shall:

(a) remains as proposed.

(b) provide evidence of successful completion of a department-approved initial 16-hour methamphetamine cleanup contractor course and submit to the department~~:~~

~~(i)~~ a copy of the methamphetamine cleanup contractor certificate of course completion issued by the training provider pursuant to ARM 17.74.514(2)(f); ~~or~~

~~(ii) a copy of the training provider's initial methamphetamine cleanup contractor course roster, which includes the applicant's name;~~

(c) through (3) remain as proposed.

(4) If a previously certified methamphetamine cleanup contractor does not apply for a renewal of ~~a~~ certification under (3) within one year following the expiration of the contractor's methamphetamine cleanup contractor certification, they become ineligible for recertification through a refresher course, and ~~the certification must be obtained under~~ must follow the provisions under (1) for certification.

(5) remains as proposed.

17.74.511 INITIAL TRAINING COURSE REQUIREMENTS (1) Initial methamphetamine cleanup contractor training courses must be taught by a person with a current methamphetamine cleanup contractor training provider certificate issued pursuant to ARM 17.74.514 and must include a minimum of 16 hours of methamphetamine cleanup contractor training that covers:

(a) through (i) remain as proposed.

(j) techniques for obtaining information to make site assessments, including:

(i) ~~baseline~~ site assessments;

(ii) ~~baseline~~ site sampling;

(iii) through (2) remain as proposed.

17.74.514 TRAINING PROVIDER CERTIFICATION (1) remains as proposed.

(2) An applicant for methamphetamine cleanup contractor training provider certification shall submit to the department at least 45 working days before the requested methamphetamine cleanup contractor training provider certification start date:

(a) remains as proposed.

(b) a list of ~~all methamphetamine cleanup contractor training providers~~ trainers and guest speakers. ~~with a description of each methamphetamine cleanup contractor training provider's qualifications, including proof that at least one~~ The

training provider is required to have a current methamphetamine cleanup contractor certification. ~~training provider has current department methamphetamine cleanup contractor certification~~ Guest speakers, such as public health specialists, law enforcement, or other relevant industry experts, do not need to be certified. However, their presentation must be supervised by the training provider;

(c) and (d) remain as proposed.

(e) ~~a list of 50 questions for~~ a final examination that is comprised of a minimum of 50 questions, with no less than 50 percent specific to this subchapter or the provisions of 75-10-1301 through 75-10-1306, MCA;

(f) a blank copy of the methamphetamine cleanup contractor certificate that will be provided to attendees who successfully complete the course and pass the examination. ~~A copy of the methamphetamine cleanup contractor certificate shall be submitted to the department.~~ Each certificate must be identified with a unique number assigned by the methamphetamine cleanup contractor training provider and include:

(i) remains as proposed.

(ii) the course attendee's name ~~and address~~;

(iii) through (viii) remain as proposed.

~~(ix) a statement that the trainee, by name, has successfully passed the examination for the methamphetamine cleanup contractor course;~~

(x) and (xi) remain the same, but are renumbered (ix) and (x).

(g) through (4) remain as proposed.

17.74.515 CERTIFIED TRAINING PROVIDER RESPONSIBILITIES (1) and (2) remain as proposed.

(3) A methamphetamine cleanup contractor training provider shall submit to the department a list of attendees within 10 working days following the completion of the methamphetamine cleanup contractor training course. The list must identify:

(a) through (c) remain as proposed.

(d) each participant's methamphetamine cleanup contractor certificate number, which is assigned by the methamphetamine cleanup contractor training provider ~~as follows:~~

~~(i) the first four digits are the year the methamphetamine cleanup contractor training course was completed;~~

~~(ii) the next three digits are the methamphetamine cleanup contractor training provider's certification number assigned by the department pursuant to ARM 17.74.514;~~

~~(iii) the last three digits are the methamphetamine cleanup contractor's certification number assigned by the methamphetamine cleanup contractor training provider in consecutive order beginning with 001 for each year the certified methamphetamine cleanup contractor training provider issues methamphetamine cleanup contractor training certificates~~; and

(e) and (4) remain as proposed.

17.74.517 DENIAL, SUSPENSION, AND REVOCATION OF CERTIFICATION (1) and (2) remain as proposed.

(3) When the department believes there is cause for denial, suspension, or

revocation of the certification of a methamphetamine cleanup contractor or methamphetamine cleanup contractor training provider under (1) or (2), it shall serve written notice of the department's determination and the basis for the department's action to deny, suspend, or revoke certification. The notice must specify the reason for denial, suspension, or revocation of a methamphetamine cleanup contractor or methamphetamine cleanup contractor training provider certification and shall include an order to take necessary corrective action within a reasonable period of time. An order becomes final unless, within 30 working days after the order is received, the ~~person named~~ methamphetamine cleanup contractor or methamphetamine cleanup contractor training provider named in the order requests, in writing, a hearing before the department.

4. The department has adopted NEW RULE II (17.74.520) and NEW RULE III (17.74.521) exactly as proposed.

5. The department has adopted NEW RULE I (17.74.519) as proposed in the supplemental notice published on June 24, 2022, but with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I (17.74.519) SAMPLING PROCEDURES (1) remains as proposed.

(2) The department may approve an ~~alternative sampling or analytical~~ equivalent method, ~~upon~~ in advance ~~written request~~, ~~when the department determines the proposed alternative~~ if the method is at least as stringent ~~equivalent to or as accurate~~ as the method~~s~~ in (1).

(3) and (4) remain as proposed.

(5) An assessment or clearance plan shall incorporate a sampling plan that follows an authoritative sampling approach, which uses professional judgment to target ~~samples all~~ areas suspected to have the highest levels of contamination within the inhabitable property and unless otherwise approved by the department, shall include ~~including~~:

(a) through (c) remain as proposed.

(d) at least one sample from each exhaust fan when exhaust fans are present in the inhabitable property, unless assumed to be contaminated by the contractor.

(6) Each ~~sampling~~ assessment plan shall include a minimum of two discretionary samples, to be collected and utilized at the methamphetamine certified contractor's discretion based on updated field observations.

(7) If the encountered site conditions at an inhabitable property are different from the expected site conditions, the methamphetamine certified cleanup contractor may complete ~~and submit~~ sampling in accordance with a modified plan ~~to the department~~. An explanation of the unexpected conditions and sampling plan deviations shall be ~~included in the information~~ submitted to the department ~~with the modified plan~~ in the final report.

6. The department has thoroughly considered all substantive and timely comments received during the public comment period. A summary of the comments

received and the department's responses are as follows:

COMMENT NO. 1: The commenter noted that "draft rules should be continued and not authorized until bill sponsors have input."

RESPONSE: The bill sponsor was notified in accordance with 2-4-302, MCA, on June 3, 2021, January 4, 2022, and then again June 24, 2022, regarding the supplemental notice. The bill sponsor has been updated regularly on the progress of this rulemaking as required under the Montana Administrative Procedure Act. No change is made in response to this comment.

COMMENT NO. 2: The commenter respectfully requested that the department not approve the proposed rules at the present time, and to reengage with the interested parties.

RESPONSE: The department seriously considered this comment and, because most of the public comments regarded proposed New Rule I, the department sought further written comments from interested parties through a supplemental rule notice limited to proposed New Rule I. Additionally, the department hosted public stakeholder meetings regarding Proposed New Rule I on June 27, 2022, and June 29, 2022.

COMMENT NO. 3: The commenter noted that the term "suspected contamination" is discussed throughout rules without a clear explanation.

RESPONSE: "Contamination" is defined in ARM 17.74.504 and cleanup contractors may rely on their professional judgment, or consult with program staff, to determine what constitutes "suspected." No change is made in response to this comment.

COMMENT NO. 4: The commenter asked if the department's checklists will be updated and provided.

RESPONSE: The department has provided checklists, as guidance to contractors, and intends to continue this practice. Reference to the department checklists is not mandatory. No change is made in response to this comment.

COMMENT NO. 5: The commenter asked if there was a difference between "sampling plan" and "assessment plan."

RESPONSE: Because the definitions of "sampling plan," "assessment plan," and "site assessment" caused confusion, the department revised the definition of "assessment plan" to include a department-approved plan, using sampling, to identify the presence or extent or potential contamination of an inhabitable property. The approved assessment plan is used to investigate suspected contamination of inhabitable property, to confirm methamphetamine contamination, and to evaluate the extent and magnitude of contamination by hazardous chemical residue from the manufacture of methamphetamine or by smoke from the use of methamphetamine. The actions taken by the certified methamphetamine cleanup contractor to implement an assessment plan may include site assessment or final assessment and clearance depending on the purpose, timing, and the outcome of the sampling.

COMMENT NO. 6: The commenter indicated that the use of "site assessment" and "site plan" need further clarification as they are both defined in ARM 17.74.504 yet mean the same thing.

RESPONSE: See Response to Comment No. 5 above. The term "site plan" is not defined in ARM 17.74.504, but "assessment plan" is defined and site assessment refers to implementation of the assessment plan by the certified methamphetamine cleanup contractor.

COMMENT NO. 7: The commenter asked why a "site assessment plan" is needed before a "sampling plan" and cites additional costs to property owners.

RESPONSE: See Responses to Comments 5 and 6 above. The department believes the revisions to the definition of "assessment plan," the elimination of the definition of "site assessment," and the responses to Comments 5 and 6 will resolve the confusion.

COMMENT NO. 8: The commenter noted that chemical contamination is not included and that various chemicals should be identified for comparison to OSHA regulations

RESPONSE: Section 75-10-1303(1), MCA provides the department authority to adopt standards for "precursors to methamphetamine that are consistent with the standard for methamphetamine." At this time, the department is not exercising its discretion to adopt standards for methamphetamine precursor compounds because the chemicals and compounds used in the manufacture of methamphetamine are evolving. The department believes the decontamination standard for methamphetamine of 1.5 micrograms per 100 square centimeters of surface material is protective of human health and will continue to assess the need to adopt additional methamphetamine decontamination standards for precursor compounds. Worker protection is regulated by OSHA, and the department has no authority to regulate in this area.

COMMENT NO. 9: The department received two comments asking about reference to "New Rule II."

RESPONSE: The department inserts the term "New Rule II" as a placeholder. When New Rule II is adopted and codified the assigned rule number of ARM 17.74.520 will be inserted in its proper place.

COMMENT NO. 10: Commenters asked if a "neutral" third party could be used for final clearances.

RESPONSE: ARM 17.74.507(1)(c) requires that "final clearance sampling is conducted by an independent certified methamphetamine cleanup contractor who is not the certified methamphetamine cleanup contractor or employed by the certified methamphetamine cleanup contractor that performed the decontamination work." No changes were made in response to this comment.

COMMENT NO. 11: The commenter asked for clarification on department "list" for smoking sites. The department should be aware that the "list" for smoke sites are public records.

RESPONSE: The list referenced in ARM 17.74.506(1) is a list of CML-contaminated properties reported to the department by state or local law enforcement. See 75-10-1306, MCA. Smoking contaminated sites are not included in this requirement and are not publicly made available on a "website." However, the commenter is correct that documents, emails, and site information collected by the department, in the performance of its confirmation that the decontamination standards are being met, are subject to Article II, Section 9 of the Montana Constitution, and 2-6-1003, MCA, and are therefore subject to records requests made by the public. No change is made in response to this comment.

COMMENT NO. 12: The commenter asked what standards within the proposal apply to "non-listed" sites.

RESPONSE: See the response to Comment 11. The department assumes the comment relates to sites contaminated by smoking. The decontamination standard in 75-5-1303, MCA applies to sites contaminated by CMLs and by smoking. No change is made in response to this comment.

COMMENT NO. 13: The commenter asked that a "neutral" third party be used for final clearances and requests that relatives and past employees of the cleanup contractor be excluded.

RESPONSE: Please see response to Comment 10. DEQ believes the requirement to use a neutral independent certified methamphetamine cleanup contractor is clear and will not amend ARM 17.74.507 to specifically exclude "relatives and past employees." No change is made in response to this comment.

COMMENT NO. 14: The commenter does not believe that the contractor qualifications are as stringent as other states and notes that changes to ARM in 2014 may not ensure adequate qualifications.

RESPONSE: The department believes the methamphetamine cleanup contractor certification requirements, which include maintenance of HAZWOPER training and Montana methamphetamine cleanup contractor certifications, are suitable to ensure methamphetamine cleanup contractors have training necessary to protect themselves and the public from exposure to methamphetamine contamination in inhabitable structures. Training requirements established in the proposed rule are minimum standards that may be augmented at the discretion of individual employers or training providers. No changes were made in response to this comment.

COMMENT NO. 15: The commenter questioned online courses and attendees signing a roster. Can the rule address this or should this remain as an exemption?

RESPONSE: The department agrees and removed submittal of the course roster as evidence of successful completion of a department-approved methamphetamine cleanup contractor course in ARM 17.74.508. The department will consider methods for authenticating and accepting electronic signatures as evidence of attendance of online courses.

COMMENT NO. 16: The commenter noted that ARM 17.74.508(4) is incomplete and missing language.

RESPONSE: The department amended the language in ARM 17.74.508(4) to clarify if a previously certified methamphetamine cleanup contractor does not apply for a renewal of certification within one year following the expiration of the contractor's methamphetamine cleanup contractor certification, they become ineligible for recertification through a refresher course and must instead retake the initial course.

COMMENT NO. 17: The commenter asked if "baseline site assessment" should be defined.

RESPONSE: The department removed the term "baseline" in ARM 17.74.511(1)(j)(i) and (ii). See responses to Comments 5 and 6. "Assessment plan" is defined in ARM 17.74.504 and clarifies that a "site assessment" is carried out by a certified methamphetamine cleanup contractor in accordance with a DEQ-approved assessment plan.

COMMENT NO. 18: The commenter asked for clarification on approval of instructor applicant qualifications.

RESPONSE: The department amended the language in ARM 17.74.514(2)(b) to clarify that a training instructor, responsible for the information given during a course, must have a current methamphetamine cleanup contractor certification. Additionally, the department amended the language in ARM 17.74.514(2)(b) to further clarify that the certification requirements do not extend to training course guest speakers.

COMMENT NO. 19: The commenter asked if the language in ARM 17.74.514(2)(f) required a blank certificate to be submitted by a training provider applicant.

RESPONSE: The department confirms that training providers must submit an example blank copy of the methamphetamine cleanup contractor certificate that will be provided to attendees who successfully complete the course and pass the examination. The language in ARM 17.74.514(2)(f) has been clarified by adding the word "blank" and the duplicative second sentence has been deleted.

COMMENT NO. 20: The commenter expressed that a student's address should not be on a training certificate, that it would seem more appropriate to have the student's address included on the course roster.

RESPONSE: The department agrees and struck "address" from ARM 17.74.514(2)(f)(ii).

COMMENT NO. 21: The commenter stated the word "approval" conflicts with the department statement of necessity on page 377 of the MAR notice, for ARM 17.74.511.

RESPONSE: The department agrees and struck the language regarding department approval of initial training courses. Instead, the department is establishing requirements and procedures for certification of methamphetamine

cleanup contractors as authorized by 75-10-1304, MCA.

COMMENT NO. 22: The commenter stated that a statement regarding a passing grade on the test is excessive as a student failing the test does not receive the certificate.

RESPONSE: The department agrees and struck the proposed language in ARM 17.74.514(2)(f)(ix).

COMMENT NO. 23: The commenter states numbering should be changed to a two-digit year followed by two-digit month instead of four-digit year only.

RESPONSE: The department struck the proposed certificate numbering system in ARM 17.74.515(3)(d)(i) through (iii). The methamphetamine cleanup contractor certificate number will be assigned by the methamphetamine cleanup contractor training provider.

COMMENT NO. 24: The commenter stated that ARM 17.74.517(3) is poorly worded.

RESPONSE: The department believes the language in ARM 17.74.517(3) sets forth a clear and fair process for appeal of a department order denying, suspending, or revoking a certification under this chapter. The department added language to clarify that the order will become final unless, within 30 working days after the order is received, the named methamphetamine cleanup contractor or methamphetamine cleanup contractor training provider submits a written request for a hearing before the department.

COMMENT NO. 25: The commenter stated that New Rule II adds requirements for submittals but does not address guidance to contractors on cleanup protocols, or adding consistency as requested in HB 116.

RESPONSE: The commenter misconstrued the intent of HB 116, which expands the requirements to notify and remediate inhabitable properties contaminated with methamphetamine from CMLs and from smoking, raises the decontamination standard, and revises the immunity for owners of contaminated inhabitable properties. New Rule II provides reasonable requirements for the documentation provided to the department pursuant to 75-10-1306, MCA, to establish the decontamination standard has been met. New Rule II does not provide recommended work practices or protocols. No changes were made to New Rule II in response to the comment.

COMMENT NO. 26: The commenter asked specific information on attics, HVACs, appliance cleaning, and encapsulation approval.

RESPONSE: New Rule I(5) requires sampling all areas of an inhabitable structure suspected of containing the highest levels of contamination and relies on the professional judgment of the certified methamphetamine cleanup contractor to select sampling locations based on site specific conditions. Please refer to response to Comment No. 75.

COMMENT NO. 27: The commenter asked why New Rule II did not include

cleanup procedures including agitation and cleanup techniques.

RESPONSE: See Response to Comment No. 25.

7. The following comments include those timely and substantive comments on proposed New Rule I (ARM 17.74.519) received during both the initial comment period and during the supplemental comment period which closed July 14, 2022:

COMMENT NO. 28: The commenter stated that the new rules are a departure from current accepted practices and may cause additional expense to owners.

RESPONSE: The department received similar comments from multiple commenters that the proposed new rules would increase cleanup costs and be burdensome to property owners. Those comments generally asserted the proposed rules are too detailed, directive, and costly. The department carefully considered the comments and simplified New Rule I to reference the standards set forth in NIOSH 9111, the Methamphetamine Indoor Decontamination Standards in 75-10-1303, MCA, and this subchapter, and to rely on the professional judgment of certified methamphetamine cleanup contractors.

COMMENT NO. 29: The commenter noted that there should be a different set of procedures for "assessment" sampling and "clearance" sampling to avoid needlessly increasing costs.

RESPONSE: New Rule I (ARM 17.74.519) provides simplified sampling procedures. The department will review and approve alternative methods when they are at least as protective as the methods in NEW RULE I(1).

COMMENT NO. 30: The commenter was concerned over the large number of samples and the cost to the contractors and to the property owners.

RESPONSE: See Response to Comment No. 26. The agency has amended the language in New Rule I(5) to require sampling all areas of an inhabitable structure suspected of containing the highest levels of contamination, rely on the professional judgment of the certified methamphetamine cleanup contractor, and provide greater collaboration between the department and contractor.

COMMENT NO. 31: The commenter noted that specifying items such as gloves is excessive, that this is covered under experience and SOPs [standard operating procedures].

RESPONSE: As noted in Response to Comment No. 29, the sampling protocols in New Rule I (ARM 17.74.519) including work practices, documentation, labelling, and chain of custody requirements have been streamlined to those necessary to ensure the accuracy and integrity of sampling.

COMMENT NO. 32: The commenter said that New Rule I is unduly burdensome and needs to allow for professional judgement instead of forcing the assumption that all rooms are contaminated

RESPONSE: See Responses to Comments 26, 28, and 30. New Rule I (ARM 17.74.519) provides simplified sampling procedures.

COMMENT NO. 33: The commenter supported previous statements regarding the new rules, that they are financially overburdensome on contractors and the property owners.

RESPONSE: See Responses to Comments 26, 28, 29, 30, and 31.

COMMENT NO. 34: The commenter stated the language "prior to sampling" should be struck.

RESPONSE: See Responses to Comments 29 and 31. The requirement in New Rule I(4)(a) to photograph sample locations is retained, but the condition that the sample locations be photographed "prior to sampling" is deleted. The sampling protocols in New Rule I (ARM 17.74.519) have been simplified to include those necessary to describe sampling location, labelling, and chain of custody requirements that ensure the accuracy and integrity of sampling. See NEW RULE I(4). Clear sampling documentation is necessary for the department to ensure the decontamination standard in 75-10-1303, MCA is met before removing properties from the list maintained under 75-10-1306, MCA, or providing a certificate of fitness.

COMMENT NO. 35: The commenter explained why clients would not pay for a separate visit, and then stressed the reasons why a client would not pay.

RESPONSE: See Responses to Comments 29, 31, and 34.

COMMENT NO. 36: The commenter noted all areas could be considered "suspect."

RESPONSE: See Responses to Comments 29 and 31. See New Rule I(5). It is necessary to consistently sample areas most likely to contain contamination. The department will rely on professional judgment of the certified methamphetamine cleanup contractors to develop and execute a reliable sampling approach. The proposed NEW RULE I(5) meets the legislative intent of 75-10-1303, MCA, by choosing sample numbers and locations based on the circumstances of the contamination.

COMMENT NO. 37: The commenter stated that "industry standards," department requirements, and EPA guidance vary in the sampling and analytical testing.

RESPONSE: See Responses to Comments 29, 31, and 36.

COMMENT NO. 38: The commenter stated the requirement for gloves should not be in the rule as it is in method and standard industry practices.

RESPONSE: See Response to Comment 31.

COMMENT NO. 39: The commenter identified that the decontamination requirement does not belong in the rule, as it is a basic IH [Industrial Health] practice.

RESPONSE: New Rule I (ARM 17.74.519) sets forth protocols for sampling for methamphetamine contamination to verify the attainment of the decontamination standard. See New Rule I(4). See Response to Comment 34.

COMMENT NO. 40: The commenter stated that New Rule I(1)(f) should be removed as the required information cannot fit on a sample container.

RESPONSE: See Responses to Comments 29, 31, and 34. The sampling protocols in New Rule I (ARM 17.74.519) have been simplified and the detailed labelling requirement in New Rule I(1)(f) has been removed. See NEW RULE I(4). The rule maintains sampling documentation requirements that are necessary for the department to ensure the decontamination standard in 75-10-1303, MCA is met before removing properties from the list maintained under 75-10-1306, MCA, or providing a certificate of fitness.

COMMENT NO. 41: The commenter noted New Rule I requires sampling labelling information that is on the chain of custody already.

RESPONSE: See Response to Comment 40.

COMMENT NO. 42: The commenter noted that "blind" labelling for quality assurance should not be used, and reliance should be on the chosen laboratory.

RESPONSE: See Responses to Comments 29, 31, 34, and 40.

COMMENT NO. 43: The commenter stated there are three different analytical methods that serve different uses and that the use of reagent should be left to the sampler.

RESPONSE: New Rule I (ARM 17.74.519) requires the use of methanol over isopropanol when sampling listed properties to verify decontamination and remove the properties from the contaminated properties list. See New Rule I(1). The department will require the use of methanol because, in controlled environments, methanol has a higher recovery rate than laboratory-grade isopropanol. The department believes use of methanol will reduce the risk of erroneously clearing properties with residual methamphetamine contamination. NEW RULE I(2) allows the department to allow alternative methods if requested in advance and justified.

COMMENT NO. 44: The commenter asked, "what if ALS is out" (refers to ALS laboratories).

RESPONSE: See Response to Comment 43. The department assumes the commenter is concerned the analytical laboratory could be out of methanol. NEW RULE I(2) provides the department may allow alternative methods if requested in advance and justified.

COMMENT NO. 45: The commenter noted that methanol may remove paint residue and since the standards allow for isopropanol to be used, it should remain an option.

RESPONSE: See Response to Comment 43.

COMMENT NO. 46: The commenter stated that the required number of samples is excessive and should be at the discretion of the sampler.

RESPONSE: See Responses to Comments 29 and 31. The department will require samples necessary to ensure consistency in sampling and allow professional

judgment of the certified methamphetamine cleanup contractor to choose a reliable sampling approach. See NEW RULE I(5). Sample location and number are based on the circumstances of the contamination.

COMMENT NO. 47: The commenter stated, "nobody will pay for this." The commenter continued that the sampling costs would exceed actual cleanup costs.
RESPONSE: See Response to Comment 46.

COMMENT NO. 48: The commenter noted that the proposal requires the collection of three samples from each "suspected" area, increasing the cost and disincentivizing assessment.
RESPONSE: See Response to Comment 46.

COMMENT NO. 49: The commenter noted that New Rule I(1)(h)(i) should be removed, as statute covers manufacturing and consumption, not storage and that the proposal does not define chemicals or methamphetamine itself.
RESPONSE: See Response to Comment 46.

COMMENT NO. 50: The commenter stated that chemical staining would be covered elsewhere in rule and is considered a "suspected" area of contamination under (b).
RESPONSE: See Response to Comment 46.

COMMENT NO. 51: The commenter asked for data and documentation to support this proposal
RESPONSE: See Response to Comment 46.

COMMENT NO. 52: The commenter stated that New Rule I(1)(h)(iii) varies widely and should be left to the discretion of the sampler.
RESPONSE: See Response to Comment 46.

COMMENT NO. 53: The commenter requested that this proposal be removed, and professional judgement of sampler should be allowed.
RESPONSE: See Response to Comment 46.

COMMENT NO. 54: The commenter stated that the surfaces in New Rule I(1)(h)(iv) clean easily. The commenter suggested that the focus should be on walls, ceilings, door jambs, trim, and HVACs. Though, it may be valid on clearances but is cost prohibitive.
RESPONSE: See Response to Comment 46.

COMMENT NO. 55: The commenter indicated that the sampling of non-porous frequently cleaned surfaces is not a common practice and adds additional costs.
RESPONSE: See Response to Comment 46.

COMMENT NO. 56: The commenter stated that the required information in

New Rule I(1)(h)(v) cannot fit on a sample container.

RESPONSE: The department assumes the commenter is referring to the sample labelling requirement in the initial proposal of New Rule I. See Response to Comment 40.

COMMENT NO. 57: The commenter requests removal of New Rule I(1)(h)(vi) as suspect areas are covered under (h).

RESPONSE: See Response to Comment 46.

COMMENT NO. 58: The commenter stated that composite sampling is cost effective when used by a sampler familiar with basic IH practices and knowledge.

RESPONSE: The department will not allow composite sampling for locating and establishing methamphetamine contamination. The compositing of multiple sample locations is inappropriate when verifying the decontamination standard of 1.5 micrograms is met. Upon prior request, the department may review and approve alternative methods if the proposed alternative is at least as protective.

COMMENT NO. 59: The commenter asked about the use of composite samples for "buy/sells."

RESPONSE: See Response to Comment 58.

COMMENT NO. 60: The commenter stated it is cheaper to do composite samples than separate samples, which adds to making it cost prohibitive which equals less compliance.

RESPONSE: See Response to Comment 58.

COMMENT NO. 61: The commenter discussed the use of composite sampling, which is primarily in real estate transactions and allows for the ability to keep costs down for property owners.

RESPONSE: See Response to Comment 58.

COMMENT NO. 62: The commenter requested the removal of New Rule I(3) as the quality assurance/quality control is defined in analytical methods and believes the term "laboratory blank" is incorrectly used to refer to a "field blank."

RESPONSE: The department revised New Rule I (ARM 17.74.519) to require sampling that safeguards accuracy and integrity and ensures the decontamination standard in 75-10-1303, MCA is met before removing properties from the list maintained under 75-10-1306, MCA, or providing a certificate of fitness. The revised version requires collection, preservation, and handling of all samples, field blanks, and media blanks under recorded chain of custody, accepted industry standards, and department-approved plans. See New Rule I(4).

COMMENT NO. 63: The commenter noted that New Rule I(4) should be removed and should defer to the professional judgement of the sampler given the additional cost to a property owner.

RESPONSE: See Responses to Comments 29, 31, 34, 40, 58, and 62.

COMMENT NO. 64: The commenter believed that New Rule I(4) should be optional, that New Rule I(4) created an additional two samples beyond the approved sampling plan.

RESPONSE: See Responses to Comments 29, 31, 34, 40, 58, and 62.

COMMENT NO. 65: The commenter believed that referencing in New Rule I of "sampling procedures" is incorrect and it should say "clearance."

RESPONSE: The department acknowledges the comment and agrees the methamphetamine cleanup rules provide sampling protocols for verifying the attainment of the decontamination standard so that properties may be removed from the list maintained by the department in accordance with 75-10-1306, MCA, or obtain a certificate of fitness pursuant to these methamphetamine cleanup rules. No change is made in response to this comment.

COMMENT NO. 66: The commenter believed that having two samples per room could still potentially end up costing the client more (initial sampling plus clearance sampling) than the cleanup itself.

RESPONSE: See Responses to Comments 29, 31, and 36. Section 75-10-1303(2), MCA, provides department authority to establish the number and locations of surface material samples to be collected based on the circumstances of the contamination and acceptable testing methods. In the absence of a department rule establishing the number and location of samples, a minimum of three samples must be taken from surfaces most likely to be contaminated at each property. See 75-10-1303(2)(b), MCA. The department revised New Rule I (ARM 17.74.519) to require at least two samples from each room or area within the inhabitable property where methamphetamine manufacturing or smoking is suspected to have occurred. This sampling must include areas likely to contain contamination. The department will rely on the professional judgment of the certified methamphetamine cleanup contractors to develop and execute a reliable sampling approach. See NEW RULE I(5). The department believes the rule meets the legislative intent of 75-10-1303, MCA, by choosing sample numbers and locations based on the circumstances of the contamination. No change is made in response to this comment.

COMMENT NO. 67: The commenter suggested that the department insert the language, "for the intent to remove from the list or receive a certificate of fitness."

RESPONSE: The rule provides that sampling procedures and laboratory analyses set forth in New Rule I are for the purpose of assessing contamination and verifying the attainment of the decontamination standards for methamphetamine within inhabitable structures to remove an inhabitable property from the contaminated properties list, maintained by the department pursuant to 75-10-1306, MCA, or to obtain a certificate of fitness, pursuant to this subchapter. See New Rule I(1). No change is made in response to this comment.

COMMENT NO. 68: The commenter recommended changing language to allow for surface area samples greater than 100cm2, which are not allowed for clearance purposes.

RESPONSE: New Rule I (ARM 17.74.519) refers to the standards set forth in

NIOSH 9111, the Methamphetamine Indoor Decontamination Standards in 75-10-1303, MCA, and this subchapter, and relies on the professional judgment of certified methamphetamine cleanup contractors. Appropriate surface area sample size is covered under NIOSH 9111, which is incorporated by reference in New Rule III with the exceptions listed in New Rule I that disallow solvents other than methanol and sample compositing. No change is made in response to this comment.

COMMENT NO. 69: The commenter suggests rewording New Rule I(2) as the determination regarding sampling or analytical methods likely exceeds the scope of the department.

RESPONSE: The department amended the language of New Rule I(2) to clarify that the department may accept an alternative sampling or analytical method, upon advance written request, when the department determines the proposed alternative method is at least as stringent or as accurate as the methods in (1).

COMMENT NO. 70: The commenter asked for clarification on the term "inhabitable property" as it applies to garages, outbuildings, attics, crawlspaces, etc.

RESPONSE: The term "inhabitable property" is defined in 75-10-1302(2), MCA, and includes buildings or structures "intended to be primarily occupied by people, either as a dwelling or a business, including a storage facility, mobile home, or recreational vehicle, that may be sold, leased, or rented for any length of time." Attics and crawlspaces that are part of inhabitable structures must be sampled in accordance with New Rule I. No change is made in response to this comment.

COMMENT NO. 71: The commenter recommended removal stating "Sampling plans should be developed using professional judgement for the purpose of the sampling. DEQ has the ability to approve or deny a sample plan if . . . needed."

RESPONSE: See Responses to Comments 29 and 31, and 36. See New Rule I(5). The department will rely on the professional judgment of certified methamphetamine cleanup contractors to develop and execute a reliable sampling approach. No change is made in response to this comment.

COMMENT NO. 72: The commenter believed that the proposal is "too ambiguous essentially all rooms would be considered contaminated until proven otherwise."

RESPONSE: See responses to Comments 29, 31, 36, 66, and 71.

COMMENT NO. 73: The commenter stated that New Rule I(5)(b) should not be mandatory but should be at the contractor's discretion.

RESPONSE: See responses to Comments 29, 31, 36, 66, and 71.

COMMENT NO. 74: The commenter stated that New Rule I(5)(b) should be based on professional judgement and that contractors and the department staff must have the ability to adjust based on the various property circumstances.

RESPONSE: See responses to Comments 29, 31, 36, 66, and 71.

COMMENT NO. 75: The commenter stated that the number of samples should increase from one sample to two samples, as sampling will be in the HVAC unit and on the cold air return.

RESPONSE: New Rule I(5) provides for at least one sample from each heating, ventilation, and air conditioning (HVAC) system's return side when such systems are present in the inhabitable property and at least one sample from each exhaust fan when exhaust fans are present in the inhabitable property. These minimum sampling requirements do not preclude collection and analysis of additional samples. The department modified New Rule I(5) to allow reduced sampling when positive results are obtained on the cold air return and the system may be assumed to be contaminated without additional sampling.

COMMENT NO. 76: The commenter believes the HVAC should be sampled as well unless it will be removed, and that clearance sampling should include the HVAC if it will be cleaned and left within the inhabitable property.

RESPONSE: See response to Comment 75. New Rule I provides minimum sampling requirements and does not preclude additional samples.

COMMENT NO. 77: The commenter stated that in New Rule I(5)(d) [exhaust] fan[s] may be removed, which would preclude sampling.

RESPONSE: See response to Comment 75. The department agrees with the comment. New Rule I(5) has been amended to allow reduced sampling when positive results are obtained on the cold air return and the system may be assumed to be contaminated without additional sampling.

COMMENT NO. 78: The commenter believed that the number of samples should be at the contractor's discretion.

RESPONSE: See response to Comment 66. Section 75-10-1303(2), MCA, provides department authority to establish the number and locations of surface material samples to be collected based on the circumstances of the contamination and acceptable testing methods. New Rule I (ARM 17.74.519) requires at least two samples from each room or area within the inhabitable property where methamphetamine manufacturing or smoking is suspected to have occurred. The department will rely on the professional judgment of the certified methamphetamine cleanup contractors to develop and execute a reliable sampling approach. See NEW RULE I(5). The department believes the rule meets the legislative intent of 75-10-1303, MCA, by choosing sample numbers and locations based on the circumstances of the contamination. No change is made in response to this comment.

COMMENT NO. 79: The commenter believes these samples should be added to the plan, but the actual collection would be performed only if the contractor identifies the need.

RESPONSE: The department assumes the comment is related to discretionary samples required in New Rule I(6). The department agrees with the commenter that the discretionary samples must be included in the department-approved assessment plan, but the collection and utilization of the discretionary

samples is at the certified methamphetamine cleanup contractor's discretion based on the professional judgment of the methamphetamine cleanup contractor and based on field observations. New Rule I(6) is amended to clarify this intent.

COMMENT NO. 80: The commenter explained that changes in the field preclude the submission of a modified plan for approval by the department.

RESPONSE: The department acknowledges the comment and amended New Rule I(7) by striking "submit a modified plan." Amended New Rule I(7) allows sampling in accordance with a modified plan with the methamphetamine cleanup contractor's explanation of the unexpected conditions and the resulting sampling plan deviations.

/s/ Angela Colamaria
ANGELA COLAMARIA
Rule Reviewer

/s/ Christopher Dorrington
CHRISTOPHER DORRINGTON
Director
Department of Environmental Quality

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.24.101, 17.24.102, 17.24.103, 17.24.105, 17.24.106, 17.24.107, 17.24.117, 17.24.119, 17.24.120, 17.24.121, 17.24.128, 17.24.153, 17.24.157, and 17.24.181 pertaining to the application and administration of hard rock small mining exclusion statements, exploration licenses, and operating permits	NOTICE OF AMENDMENT (HARD ROCK MINING)

TO: All Concerned Persons

1. On July 8, 2022, the Department of Environmental Quality (department) published MAR Notice No. 17-423 pertaining to the proposed amendment of the above-stated rules at page 1143 of the 2022 Montana Administrative Register, Issue No. 13.

2. The department has amended ARM 17.24.101, 17.24.102, 17.24.103, 17.24.105, 17.24.106, 17.24.107, 17.24.117, 17.24.119, 17.24.120, 17.24.121, 17.24.128, 17.24.153, 17.24.157, and 17.24.181 as proposed.

3. The department has thoroughly considered the comments made. A summary of the comments and the department's responses are as follows:

COMMENT 1: A commenter said that ARM 17.24.128 should not be amended to require the department to conduct three annual inspections of mines only where acid mine drainage is expected or ongoing rather than mines with the potential to generate acid rock drainage. The change from "potential" to "expected or ongoing" increases regulatory uncertainty and subjectivity into the rules. The change also increases the risk to water quality.

RESPONSE 1: The department appreciates the comment. It should first be noted the proposed rule amendment does not negate permit conditions requiring the operator to monitor for acid rock drainage. Rather, the amendment removes the requirement the department perform three inspections per year based on permit conditions imposed on an operator.

The frequency of the department's inspections should be based on geologic conditions, and monitoring and water quality results. The proposed amendment obligates the department to performing three inspections per year regardless of permit conditions if the department determines that there are geologic conditions (such as the presence of sulfide mineralization) or the operator's monitoring demonstrates conditions under which the department expects acid rock drainage to occur, or if acid rock drainage is occurring. Water quality will be better protected with this proposed amendment as the department has increased flexibility to perform

additional inspections if acid rock drainage is expected or detected, regardless of whether the permit contains a condition that the operator monitor potential acid rock drainage.

/s/ Angela Colamaria
ANGELA COLAMARIA
Rule Reviewer

/s/ Christopher Dorrington
CHRISTOPHER DORRINGTON
Director
Department of Environmental Quality

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I pertaining to the Motor Carrier Services vehicles authorized to bypass weigh stations and the amendment of ARM 18.8.101 and 18.8.1301 pertaining to Motor Carrier Services definitions and compliance with weigh station bypass	))))))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On June 10, 2022, the Department of Transportation published MAR Notice No. 18-189 pertaining to the proposed adoption and amendment of the above-stated rules at page 859 of the 2022 Montana Administrative Register, Issue Number 11. On August 5, 2022, the department extended the comment period for the proposed adoption and amendment at page 1423 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has adopted New Rule I (18.8.1302) as proposed.

3. The department has amended the above-stated rules as proposed.

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received, and the department's responses are as follows:

COMMENT 1: One comment was received stating that trucks that are clearly and visibly unloaded should receive weigh station bypass authorization.

RESPONSE: The department notes that consideration for weigh station bypass approval criteria includes Gross Vehicle Weight (GVW) and other factors, including, but not limited to, safety, credential verification, and fuel tax compliance. Specific approval for each individual truck authorized to bypass weigh stations is needed to maintain consistency and programmatic oversight.

COMMENT 2: Two comments were received asking for clarification on the weigh station bypass authorization process, including multiple trips, and if a carrier can appeal a denial or authorization revocation.

RESPONSE: Motor Carrier Services (MCS) will implement a process for weigh station bypass authorization that verifies credentials and trip frequency, rather than implementing an application process. Weigh station bypass authorization, denial, or revocation will be designated to the district supervisors to ensure process

consistency. A carrier may appeal the district supervisor's decision to the division administrator.

COMMENT 3: One commenter asked for clarification on the criteria for a bypass authorization to be rescinded.

RESPONSE: A bypass authorization may be rescinded if there is a pattern of repeated violations such as exceeding weight limits, failing to pay GVW fees, or failing to adhere to the criteria for bypass approval, and will be evaluated on a case-by-case basis.

COMMENT 4: One comment was received stating that the multiple trip definition should be either weekly or monthly, rather than daily.

RESPONSE: MCS disagrees with the comment as there are instances where daily bypass authorization is appropriate, and MCS does not want to limit the weigh station bypass authorization opportunities.

COMMENT 5: One comment was received asking if New Rule I(1)(d) applies to contracted motor coaches hauling high school sports teams.

RESPONSE: New Rule I(1)(d) allows school buses, as defined in 20-10-101, MCA, operating for school-sponsored activities to bypass weigh stations.

COMMENT 6: One comment was received asking why the carriers identified in New Rule I(1)(c), (d), and (e) do not need administrator approval for weigh station bypass authorization.

RESPONSE: The vehicles in New Rule I(1)(c), (d), and (e) each receive exemptions from specific regulations by other authorities, and as such, division administrator approval is not appropriate. Vehicles designated in New Rule I(1)(c) are exempt under 49 CFR 390.3. Vehicles designated in New Rule I(1)(d) are exempt under 49 CFR 390.5 and 20-10-101, MCA. Vehicles designated in New Rule I(1)(e) pertain to carriers hauling passengers on a regular route, and Federal Motor Carrier Safety Administration (FMCSA) guidance provides that passenger vehicles in-transit loaded with passengers shall not be stopped and inspected.

COMMENT 7: One comment was received asking why vehicles identified in New Rule I(2) need administrator approval.

RESPONSE: Vehicles designated under New Rule I(2) are regulated by MCS inspection jurisdiction, and as such, division administrator approval is appropriate.

COMMENT 8: One commenter asked what a harvesting "support" vehicle is.

RESPONSE: Harvesting support vehicles are vehicles used in support of a harvesting operation, such as sugar beet trucks, combine trailers, header trailers, etc.

COMMENT 9: One comment was received asking if permitted loads can bypass scales if added to the permit condition, and if not, can the rules clarify single stop per trip guidelines?

RESPONSE: The criteria for all permitted loads fall outside the scope of the current rule notice.

COMMENT 10: One comment was received asking how many interested persons received this rule notice.

RESPONSE: The amended rulemaking notice was sent to 81 interested parties.

COMMENT 11: One comment was received noting inadequate time to provide notice and comment.

RESPONSE: MCS extended the comment period to provide additional time for interested parties to respond.

COMMENT 12: Four comments were received in support of the proposed new rule.

RESPONSE: MDT thanks the commenters for their support.

/s/ Valerie A. Balukas
Valerie A. Balukas
Alternate Rule Reviewer

/s/ Malcolm "Mack" Long
Malcolm "Mack" Long
Director
Department of Transportation

Certified to the Secretary of State September 13, 2022.

BEFORE THE PUBLIC SAFETY OFFICERS
STANDARDS AND TRAINING COUNCIL
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 23.13.102, 23.13.702, 23.13.703, 23.13.704, 23.13.706, 23.13.719, and 23.13.721 pertaining to the certification of public safety officers	))))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On May 27, 2022, the Public Safety Officers Standards and Training Council published MAR Notice No. 23-13-264 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 732 of the 2022 Montana Administrative Register, Issue Number 10.

2. The Public Safety Officers Standards and Training Council has amended the above-stated rules as proposed.

3. No comments or testimony were received.

/s/ Derek Oestreicher
Derek Oestreicher
Rule Reviewer

/s/ David M.S. Dewhirst
David M.S. Dewhirst
Solicitor General
Montana Department of Justice

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 23.16.102, 23.16.103, 23.16.110, 23.16.502, 23.16.1716, 23.16.1826, 23.16.1913, 23.16.1914, 23.16.1915, 23.16.1916, 23.16.1916A, 23.16.1920, and 23.16.2001 pertaining to the Gambling Control Division headquarters address change	)	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Department of Justice published MAR Notice No. 23-16-265 pertaining to the proposed amendment of the above-stated rules at page 1427 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has amended the above-stated rules as proposed.

3. No comments or testimony were received.

/s/ Derek Oestreicher
Derek Oestreicher
Rule Reviewer

/s/ David M.S. Dewhirst
David M.S. Dewhirst
Solicitor General
Montana Department of Justice

Certified to the Secretary of State September 13, 2022.

BEFORE THE BOARD OF ARCHITECTS AND LANDSCAPE ARCHITECTS, BOARD OF ATHLETIC TRAINERS, BOARD OF BARBERS AND COSMETOLOGISTS, BOARD OF BEHAVIORAL HEALTH, BOARD OF CHIROPRACTORS, BOARD OF CLINICAL LABORATORY SCIENCE PRACTITIONERS, STATE ELECTRICAL BOARD, BOARD OF MEDICAL EXAMINERS, BOARD OF NURSING, BOARD OF NURSING HOME ADMINISTRATORS, BOARD OF OPTOMETRY, BOARD OF PHYSICAL THERAPY EXAMINERS, BOARD OF PRIVATE SECURITY, BOARD OF PUBLIC ACCOUNTANTS, BOARD OF REALTY REGULATION, BOARD OF RESPIRATORY CARE PRACTITIONERS, BOARD OF VETERINARY MEDICINE, BOARD OF PERSONNEL APPEALS, HUMAN RIGHTS COMMISSION, AND UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.7.101, 24.9.101, 24.26.201, 24.114.201, 24.114.202, 24.118.101, 24.118.201, 24.121.102, 24.121.201, 24.126.101, 24.126.201, 24.126.202, 24.129.101, 24.129.201, 24.129.202, 24.141.101, 24.141.201, 24.141.202, 24.156.202, 24.159.101, 24.159.201, 24.159.202, 24.162.101, 24.162.201, 24.162.202, 24.168.101, 24.168.201, 24.168.202, 24.177.101, 24.177.201, 24.177.202, 24.182.101, 24.182.202, 24.201.201, 24.201.202, 24.210.101, 24.210.201, 24.210.202, 24.213.101, 24.213.201, 24.213.202, 24.219.201, 24.219.204, 24.225.101, 24.225.201, and 24.225.202, and the adoption of NEW RULES I, II, and III, regarding organizational, procedural, and public participation rules	)	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On June 10, 2022, the Department of Labor and Industry (department) published MAR Notice No. 24-101 -395 pertaining to the public hearing on the proposed amendment and adoption of the above-stated rules at page 866 of the 2022 Montana Administrative Register, Issue Number 11.

2. The department held a public hearing in Helena on July 7, 2022, over the Zoom videoconference and telephonic platform. No comments were received during the public comment period.

3. The department has amended the following rules exactly as proposed:

UNEMPLOYMENT INSURANCE APPEALS BOARD

Amended: 24.7.101

UNEMPLOYMENT INSURANCE
APPEALS BOARD
LAURA FIX, CHAIR

HUMAN RIGHTS COMMISSION

Amended: 24.9.101

HUMAN RIGHTS COMMISSION
PETER M. DAMROW, CHAIR

BOARD OF PERSONNEL APPEALS

Amended: 24.26.201

BOARD OF PERSONNEL APPEALS
BRIAN HOPKINS, PRESIDING OFFICER

4. The boards have amended and adopted the following rules exactly as proposed:

BOARD OF ARCHITECTS AND LANDSCAPE ARCHITECTS

Amended: 24.114.201
24.114.202

BOARD OF ARCHITECTS AND
LANDSCAPE ARCHITECTS
MAIRE EITHNE O'NEILL, PRESIDENT

BOARD OF ATHLETIC TRAINERS

Amended: 24.118.101
24.118.201
Adopted: NEW RULE I (ARM 24.118.202)
NEW RULE II (ARM 24.118.403)

BOARD OF ATHLETIC TRAINERS
JOHN WEIDA, CHAIR

BOARD OF BARBERS AND COSMETOLOGISTS

Amended: 24.121.102
24.121.201
Adopted: NEW RULE III (ARM 24.121.202)

BOARD OF BARBERS AND
COSMETOLOGISTS
ANGELA PRINTZ, PRESIDENT

BOARD OF CHIROPRACTORS

Amended: 24.126.101
24.126.201
24.126.202

BOARD OF CHIROPRACTORS
MARCUS NYNAS, D.C., PRESIDENT

BOARD OF CLINICAL LABORATORY SCIENCE PRACTITIONERS

Amended: 24.129.101
24.129.201
24.129.202

BOARD OF CLINICAL LABORATORY SCIENCE PRACTITIONERS
MATTHEW KALANICK, CLS, CHAIR

STATE ELECTRICAL BOARD

Amended: 24.141.101
24.141.201
24.141.202

STATE ELECTRICAL BOARD
DERRICK HEDALEN, PRESIDENT

BOARD OF MEDICAL EXAMINERS

Amended: 24.156.202

BOARD OF MEDICAL EXAMINERS
CHRISTINE EMERSON, R.D., PRESIDENT

BOARD OF NURSING

Amended: 24.159.101
24.159.201
24.159.202

BOARD OF NURSING
SARAH SPANGLER, R.N., PRESIDENT

BOARD OF NURSING HOME ADMINISTRATORS

Amended: 24.162.101
24.162.201
24.162.202

BOARD OF NURSING HOME ADMINISTRATORS
KATHRYN BEATY, PRESIDING OFFICER

BOARD OF OPTOMETRY

Amended: 24.168.101
24.168.201
24.168.202

BOARD OF OPTOMETRY
DR. DOUGLAS KIMBALL, PRESIDENT

BOARD OF PHYSICAL THERAPY EXAMINERS

Amended: 24.177.101
24.177.201
24.177.202

BOARD OF PHYSICAL THERAPY EXAMINERS
HOLLY CLAUSSEN, PT,
PRESIDING OFFICER

BOARD OF PRIVATE SECURITY

Amended: 24.182.101
24.182.202

BOARD OF PRIVATE SECURITY
HOLLY DERSHEM-BRUCE, PRESIDENT

BOARD OF PUBLIC ACCOUNTANTS

Amended: 24.201.201
24.201.202

BOARD OF PUBLIC ACCOUNTANTS
DAN VUCKOVICH, CPA,
PRESIDING OFFICER

BOARD OF REALTY REGULATION

Amended: 24.210.101
24.210.201
24.210.202

BOARD OF REALTY REGULATION
DAN WAGNER, PRESIDING OFFICER

BOARD OF RESPIRATORY CARE PRACTITIONERS

Amended: 24.213.101
24.213.201
24.213.202

BOARD OF RESPIRATORY CARE PRACTITIONERS
JUSTIN O'BRIEN, PRESIDING OFFICER

BOARD OF BEHAVIORAL HEALTH

Amended: 24.219.201
24.219.204

BOARD OF BEHAVIORAL HEALTH
ELAINE MARONICK, LCSW-LMFT, CHAIR

5. The Board of Veterinary Medicine is not proceeding with the amendments to ARM 24.225.101, 24.225.201, and 24.225.201 at this time.

/s/ DARCEE L. MOE
Darcee L. Moe
Rule Reviewer

/s/ LAURIE ESAU
Laurie Esau, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
AND THE BOARD OF PHARMACY
STATE OF MONTANA

In the matter of the amendment of ARM 24.101.413, 24.174.401, 24.174.1201, 24.174.1202, 24.174.1203, 24.174.1207, 24.174.1208, 24.174.1211, 24.174.1702, 24.174.1703, and 24.174.1704 and the repeal of ARM 24.174.1212 and 24.174.1213 pertaining to the Board of Pharmacy	)	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On July 22, 2022, the Department of Labor and Industry (department) and the Board of Pharmacy (board) published MAR Notice No. 24-174-79 regarding the public hearing on the proposed amendment and repeal of the above-stated rules, at page 1216 of the 2022 Montana Administrative Register, Issue No. 14.

2. On August 12, 2022, a public hearing was held on the proposed amendment and repeal of the above-stated rules via the videoconference and telephonic platform. Comments were received by the August 19, 2022, deadline.

3. The board has thoroughly considered the comments received. A summary of the comments and the board responses are as follows:

COMMENT 1: Several commenters generally supported the rule changes, including the outline of different license categories and the expected process for implementation of Senate Bill 68. They further asked the board to provide resources to guide existing licensees in obtaining the appropriate license.

RESPONSE 1: The board will provide instructions on the implementation and to assist transition on the board's webpage and through direct licensee communication.

COMMENT 2: Several commenters requested clarification on ARM 24.174.1201, and specifically when facilities will need separate wholesale distributor and/or third-party logistics provider (3PL) licenses based on a facility's scope of services, ownership of product, and when performing multiple wholesale distribution and 3PL services activities.

RESPONSE 2: The board agrees that clarification is needed and is further amending ARM 24.174.1201(1). Facilities that provide services meeting the requirements of this rule as a wholesaler, a 3PL, or both, will need separate licenses for each activity. For example, when providing wholesale and 3PL services, a facility

will need both a wholesale distributor license and a 3PL license. The board will also clarify the requirements in outreach, education materials, and in applications.

COMMENT 3: Several commenters were concerned with the requirements in ARM 24.174.1201 to designate a new person-in-charge and notify the board within 72 hours of the change. The commenters believed this timeline could be difficult for smaller facilities under certain circumstances, and suggested a 30-day notification that other states offer.

RESPONSE 3: The board recognizes that a 72-hour timeline could pose challenges for licensees in the distribution supply chain and notes that per current rule, the timeline for board notification is 30 days. The board also believes it could be difficult for wholesale distributors and 3PLs to identify a new person-in-charge and submit fingerprints for the required criminal background checks in 72 hours. Therefore, the board is amending ARM 24.174.1201 and 24.174.1202 to remove the shortened timeline and retain the 30-day notification. If facility contact is needed during a change of person-in-charge, the board will contact the owner(s) or other staff.

COMMENT 4: Several commenters requested clarification on board-approved forms given the new process for criminal background check procedures, including fingerprint, application, and timeline forms.

RESPONSE 4: Board-approved forms will be available on the board's website (www.pharmacy.mt.gov) and through the application process which outlines the division's standard procedures and details for fingerprint and criminal background checks.

COMMENT 5: Several commenters requested clarification on the need for multiple facility licenses when a manufacturer serves as their own wholesale distributor for their own labeled products and/or products of a partner/sister manufacturer which they do not own.

RESPONSE 5: ARM 24.174.1202(6) provides that a manufacturer is only licensed when located in Montana. A facility may need multiple separate licenses if providing services as a manufacturer, wholesale distributor, 3PL (which does not take ownership of a product as a wholesaler does), and/or repackager, per ARM 24.174.1201 and 24.174.1202.

COMMENT 6: Multiple commenters generally supported the rule changes, as they supported the board's efforts during the legislative process in creating the licensure framework to comply with the federal Drug Supply Chain Security Act (DSCSA), as implemented by the U.S. Food and Drug Administration (FDA).

RESPONSE 6: The board agrees that the final rules create a licensure framework to comply with future DSCSA requirements.

COMMENT 7: Multiple commenters believed the board's proposed rules to be an initial step towards complying with DSCSA and the FDA's future final rule regarding "National Standards for the Licensure of Wholesale Drug Distributors and Third-Party Logistics Providers." They asserted the FDA's final rule will establish uniform national licensure regulations to ensure regulatory clarity and consistency, help prevent counterfeits, discourage gray market activities, and further enhance the safety and efficiency of the drug supply chain.

RESPONSE 7: The board understands the importance of future rulemaking to ensure Montana's compliance with federal DSCSA national standards once the FDA issues its final rule outlining state requirements. The board expects that the licensing framework created in these rules will provide a pathway to implement future FDA requirements by separating the license types and services of wholesale distributors, 3PLs, repackagers, and manufacturers within the drug supply chain.

COMMENT 8: Several commenters stated their commitment to a secure prescription drug supply chain and look forward to working with the board on subsequent rules once the FDA finalizes its rule to comply with DSCSA.

RESPONSE 8: See RESPONSE 7.

4. The department has amended ARM 24.101.413 exactly as proposed.

5. The board has amended ARM 24.174.401, 24.174.1203, 24.174.1207, 24.174.1208, 24.174.1211, 24.174.1702, 24.174.1703, and 24.174.1704 exactly as proposed.

6. The board has repealed ARM 24.174.1212 and 24.174.1213 exactly as proposed.

7. The board has amended ARM 24.174.1201 and 24.174.1202 with the following changes, stricken matter interlined, new matter underlined:

24.174.1201 WHOLESALE DISTRIBUTOR AND THIRD-PARTY LOGISTICS PROVIDER LICENSING (1) Every person engaged in wholesale distribution of drugs or prescription devices, which includes reverse wholesale distribution~~,~~ and medical gases, or engaged as a third-party logistics provider (3PL), as defined in 37-7-602, MCA, shall be licensed annually by the board. Each applicant shall:

(a) through (e)(i) remain as proposed.

(ii) Within ~~72 hours~~ 30 days of termination of services, a new person-in-charge must be designated in writing on the appropriate board-approved forms and filed with the board.

(2) through (8) remain as proposed.

AUTH: 37-7-201, 37-7-610, MCA
IMP: 37-7-603, 37-7-604, 37-7-605, 37-7-606, 37-7-611, 37-7-612, MCA

24.174.1202 MANUFACTURER AND REPACKAGER LICENSING

(1) through (1)(e)(i) remain as proposed.

(ii) Within ~~72 hours~~ 30 days of termination of services, a new person-in-charge must be designated in writing on the appropriate board-approved forms and filed with the board.

(2) through (7) remain as proposed.

AUTH: 37-7-201, 37-7-610, MCA
IMP: 37-7-201, 37-7-604, 37-7-605, 37-7-610, MCA

BOARD OF PHARMACY
TONY KING, PHARMACIST,
PRESIDENT

/s/ DARCEE L. MOE
Darcee L. Moe
Rule Reviewer

/s/ LAURIE ESAU
Laurie Esau, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State September 13, 2022.

BEFORE THE BOARD OF MILK CONTROL
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 32.24.504 pertaining to transfer of quota and 32.24.505 pertaining to reassignment of quota from the unassigned quota pool and readjustment of quota into the statewide quota system	)))))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Board of Milk Control (board) published MAR Notice No. 32-22-330 pertaining to the proposed amendment of the above-stated rules at page 1434 of the 2022 Montana Administrative Register, Issue Number 15.

2. The board has amended the above-stated rules as proposed.

3. No comments or testimony were received.

/s/ Darcy Alm
Darcy Alm
Rule Reviewer

/s/ Ken Bryan
Ken Bryan
Chair
Board of Milk Control

Certified to the Secretary of State September 13, 2022.

BEFORE THE BOARD OF MILK CONTROL
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 32.24.480 pertaining to producer pricing rules	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Board of Milk Control (board) published MAR Notice No. 32-22-331 pertaining to the proposed amendment of the above-stated rule at page 1438 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has amended the above-stated rule as proposed.

3. No comments or testimony were received.

/s/ Darcy Alm
Darcy Alm
Rule Reviewer

/s/ Ken Bryan
Ken Bryan
Chair
Board of Milk Control

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 32.3.435 pertaining to testing within the DSA	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Department of Livestock published MAR Notice No. 32-22-332 pertaining to the proposed amendment of the above-stated rule at page 1441 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has amended the above-stated rule as proposed.

3. No comments or testimony were received.

/s/ Darcy Alm
Darcy Alm
Rule Reviewer

/s/ Michael S. Honeycutt
Michael S. Honeycutt
Executive Officer
Department of Livestock

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the amendment of ARM 36.14.101, 36.14.201, 36.14.309, 36.14.402, 36.14.406, 36.14.407, 36.14.501, 36.14.601, 36.14.602, and 36.14.603 and the repeal of ARM 36.14.311 pertaining to Dam Safety	)))))))	NOTICE OF AMENDMENT AND REPEAL

To: All Concerned Persons

1. On July 8, 2022, the Department of Natural Resources and Conservation (department) published MAR Notice No. 36-22-216 pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules at page 1177 of the 2022 Montana Administrative Register, Issue Number 13.

2. The department has amended and repealed the above-stated rules as proposed.

3. The department has thoroughly considered the written comments received. No oral comments were received at the August 9, 2022 public hearing. A summary of the written comments appears below with the department's responses:

COMMENT NO. 1: The rules should be amended and repealed as proposed.

RESPONSE NO. 1: The department agrees.

COMMENT NO. 2: The EAP signature requirement in ARM 36.14.406 should remain. It secures buy-in from local emergency responders and ensures they have reviewed the EAP for high-hazard structures. A signed EAP helps spread responsibility in times of emergency.

RESPONSE NO. 2: The department disagrees. The EAP signature requirement has proven to be a significant obstacle to timely plan distribution for many dam owners. Dam owners are encouraged to work closely with local emergency managers to ensure proper response in an emergency and can ask for signatures at their discretion. The requirements in rule ensure buy-in, review, and acceptance of responsibility regardless of the signature.

/s/ Amanda Kaster
Amanda Kaster
Director
Natural Resources and Conservation

/s/ Joslyn Hunt
Joslyn Hunt
Rule Reviewer

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I through VIII and the repeal of ARM 37.34.1901, 37.34.1903, 37.34.1905, 37.34.1907, 37.34.1909, 37.34.1911, 37.34.1913, 37.34.1915, 37.34.1917, 37.34.1919, 37.34.1921, 37.34.1923, 37.34.1925, 37.34.1927, 37.34.1929, 37.34.1931, 37.34.1933, 37.34.1935, 37.34.1937, 37.34.1939, 37.34.1941, 37.34.1943, 37.34.1945, 37.34.1947, 37.34.1949, 37.34.1951, 37.34.1953, 37.34.1955, 37.34.1957, 37.34.1959, 37.34.1961, 37.34.1963, and 37.34.1965 pertaining to applied behavior analysis services	)))

a paper copy may be obtained from the department by a request in writing to the Department of Public Health and Human Services, Behavioral Health and Developmental Disabilities Division, Developmental Disabilities Program, 111 N. Sanders, P.O. Box 4210, Helena, MT 59604-4210 or at https://medicaidprovider.mt.gov/76.

(12) through (20) remain as proposed.

AUTH: 53-2-201, 53-6-113, 53-21-703, MCA
IMP: 53-1-601, 53-1-602, 53-2-201, 53-6-101, MCA

NEW RULE II (37.34.1908) INITIAL ELIGIBILITY (1) For a member to qualify for initial ABA services, the member must meet the functional impairment criteria and ~~must~~ one of the following:

(a) through (3) remain as proposed.

AUTH: 53-2-201, 53-6-113, 53-21-703, MCA
IMP: 53-1-601, 53-1-602, 53-2-201, 53-6-101, 53-6-111, MCA

NEW RULE III (37.34.1912) CONTINUED ELIGIBILITY FOR ADDITIONAL UNITS OF SERVICE (1) through (3)(a)(i) remain as proposed.

(ii) the ~~treatment plan~~ member must demonstrate progress in each of the identified treatment goals or provide a clinical explanation and modification to address a lack of progress; and

(iii) through (7) remain as proposed.

AUTH: 53-2-201, 53-6-113, 53-21-703, MCA
IMP: 53-1-601, 53-1-602, 53-2-201, 53-6-101, 53-6-111, 53-21-701, 53-21-702, MCA

4. The department has repealed the above-stated rules as proposed.

5. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: One commenter requested that a provider, other than a qualified health care professional with expertise in the diagnostic area (QHP), who has performed a diagnostic evaluation for autism spectrum disorder (ASD), be allowed to send that evaluation to a QHP to be reviewed and signed off on to avoid a financial burden to clients who completed an evaluation with a provider other than a QHP.

RESPONSE #1: The department cannot accommodate this request. The standard for evaluating a child for ASD consists of an assessment performed by a lead clinician who has expertise in the diagnosis and management of ASD. As provided in New Rule I, QHP refers to a child and adolescent psychiatrist, a general psychiatrist with child and adolescent experience, a developmental pediatrician, or a neuropsychologist or psychologist.

COMMENT #2: One commenter requested that the phrase "specifically authorized in writing by the department" under New Rule IV(2)(f) be clarified for telehealth services.

RESPONSE #2: In response to this question, the department is developing a telehealth exception request form for requesting authorization of services. The form should be used by providers to seek authorization. The department will review the completed form for clinical appropriateness, based on best practices as defined by the Council of Autism Service Providers (CASP) Practice Parameters for Telehealth-Implementation of Applied Behavior Analysis. The form will be available at https://medicaidprovider.mt.gov/76. The department has amended the manual to reflect the addition of this form.

COMMENT #3: One commenter requested clarification on whether a parent's inability to be engaged in treatment precipitates the end of services.

RESPONSE #3: The department clarifies that, although it is best practice for parents or guardians to be actively engaged in treatment, eligibility for additional units of service is based on the member's progress. It is important to note that parent or guardian consent must be obtained prior to the delivery of service.

COMMENT #4: One commenter requests that the department include within the rules a provision for rededicating the services towards free and appropriate public education in the least restrictive environment for anyone receiving ABA services under the program. The commenter states that there are no other good alternatives, especially in the ways that ABA practices often are integrated or run adjacent to primary and secondary education.

RESPONSE #4: Medicaid-funded ABA services may be delivered in a school setting if a provider chooses to do so. As for the suggestion that the department should use Medicaid dollars to fund public education, federal regulations prohibit the department from doing so. The request is contrary to federal regulations, beyond the scope of the department's authority, and outside the scope of this rulemaking.

COMMENT #5: Several commenters expressed concern that the new rules do not contain language regarding intermediate professionals such as in-training board certified behavioral analysts (BCBA) and BCBA students.

RESPONSE #5: Based on this comment, the department will amend the Montana Medicaid Applied Behavior Analysis Manual to clarify that "intermediate professional" means a graduate student who has completed basic coursework requirements for Behavior Analyst Certification Board (BACB) certification and is in process of completing the experience portion of the eligibility requirements as delineated in the Applied Behavior Analysis Treatment of Autism Spectrum Disorder: Practice Guidelines for Healthcare Funders and Managers Second Edition. The

ABA fee schedule includes a fee for services rendered by an intermediate professional.

COMMENT #6: A commenter requests that the department remove PRTF in services that cannot be provided concurrently to the list of concurrent services in New Rule V(2)(a) so that children residing in PRTFs and have behavioral needs may benefit from ABA services.

RESPONSE #6: The department thanks the commenter for this feedback and will take it under advisement and consideration for future programmatic or rulemaking changes.

COMMENT #7: A commenter asked why the state requires a behavior identification assessment (BIA) and not a functional behavior assessment (FBA), which the commenter stated is consistent with the application of ABA. The services are required by a Board Certified Behavior Analyst (BCBA), and BCBAs typically conduct FBAs.

RESPONSE #7: The department clarifies that an FBA can be a component of the assessment process, and a provider may choose to do an FBA in conducting a BIA. The proposed rules are intended to give providers a level of discretion in choosing the tools they use to conduct assessments.

COMMENT #8: A commenter pointed out there should be an "or" after New Rule II(1)(a), or it could be interpreted that a person needs to have ASD and be eligible for developmental disabilities services or have a serious emotional disturbance.

RESPONSE #8: The department appreciates the comment and has amended the introductory language of New Rule II(1) to clarify that (a) through (c) are disjunctive.

COMMENT #9: A commenter requested the department add licensed mental health professionals, LCSWs and LCPCs to definitions to permit those professions to diagnose and authorize ABA services or to provide the department's reasoning for excluding LCSWs and LCPCs. The commenter further requests that ABA rules be consistent across other Children's Mental Health Bureau (CMHB) services and allow all licensed mental health professions to diagnose youth.

RESPONSE #9: The department cannot accommodate this request because although youth with SED may be eligible for ABA services, ABA services are not included in the range of services provided through the department's CMHB. Additionally, the ABA service requires a prescription; because LCSWs and LCPCs are not prescribers, they cannot authorize such service.

COMMENT #10: A commenter requests that New Rule III Continued Eligibility for Additional Units of Service (3)(a)(ii) and (iii) be changed as follows: (3)(a)(ii) "the client must demonstrate progress in each of the identified treatment goals or a clinical explanation is provided to address a lack of progress;" and (3)(a)(iii) "The

member is not experiencing a worsening of skill deficits or behaviors due to the treatment services as evidenced by progress towards treatment goals documentation."

RESPONSE #10: The department appreciates the commenter's feedback and will take this suggestion under advisement for future programmatic or rulemaking changes.

COMMENT #11: A commenter requested clarification on why the treatment plan is called a treatment plan instead of a behavior intervention plan (BIP).

RESPONSE #11: The department clarifies that a BIP is one component of the treatment plan.

COMMENT #12: A commenter expressed concern that the 30-day timeframe for completing the treatment plan would inhibit the quality of care and requested that the timeframe be extended to 60-days.

RESPONSE #12: The department cannot accommodate this request. Completion of the treatment plan in 30 days is consistent with best practices and is reasonable, given that initial eligibility for ABA services is 180 days, or six months. The department's ABA manual allows for an extension to the 30-day timeframe in extenuating circumstances – which may address the commenter's concerns at least in part. In keeping with behavioral health standards, treatment plans must be updated when clinically indicated.

/s/ BRENDA K. ELIAS
Brenda K. Elias
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.114.101, 37.114.105, 37.114.201, 37.114.203, 37.114.204, 37.114.314, 37.114.315, 37.114.501, 37.114.512, 37.114.515, 37.114.530, 37.114.531, 37.114.552, and 37.114.583 and the repeal of 37.114.586 pertaining to communicable disease control	)))))))))))))	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On August 5, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-971 pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules at page 1460 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has amended the above-stated rules as proposed.

3. The department has repealed the above-stated rule as proposed.

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: A commenter expressed support for the proposed rulemaking and the department's efforts to ensure communicable disease and control rules reflect the most current expert guidance available.

RESPONSE #1: The department thanks the commenter for their support of the rulemaking.

/s/ ROBERT LISHMAN
Robert Lishman
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.89.1001, 37.89.1003, 37.89.1005, 37.89.1007, and 37.89.1009 pertaining to county and tribal matching grant	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-977 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1471 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has amended the above-stated rules as proposed.

3. No comments or testimony were received.

/s/ BRENDA K. ELIAS
Brenda K. Elias
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I through IX, amendment of ARM 37.106.2802, 37.106.2803, 37.106.2804, 37.106.2805, 37.106.2809, 37.106.2810, 37.106.2814, 37.106.2815, 37.106.2816, 37.106.2817, 37.106.2821, 37.106.2822, 37.106.2823, 37.106.2824, 37.106.2829, 37.106.2835, 37.106.2836, 37.106.2838, 37.106.2847, 37.106.2849, 37.106.2854, 37.106.2855, 37.106.2860, 37.106.2866, 37.106.2875, 37.106.2885, 37.106.2896, and 37.106.2904, and repeal of ARM 37.106.2886 pertaining to assisted living rules related to background checks and category D endorsement	)	NOTICE OF ADOPTION, AMENDMENT, AND REPEAL

TO: All Concerned Persons

1. On May 27, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-979 pertaining to the public hearing on the proposed adoption, amendment, and repeal of the above-stated rules at page 746 of the 2022 Montana Administrative Register, Issue Number 10.

2. The department has adopted the following rules as proposed: New Rules I (37.106.2899), III (37.106.2899B), VI (37.106.2899E), VII (37.106.2899F), and IX (37.106.2899H).

3. The department has adopted the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE II (37.106.2899A) CATEGORY D: ADMINISTRATOR QUALIFICATIONS (1) In addition to requirements in ARM 37.106.2873, an administrator for a category D facility must have a least three years of experience in the field of mental health and mental disorders.

(2) Of the 16 hours of annual continued education training required in ARM 37.106.2814, eight hours must be in the field of mental health and mental disorders.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA
IMP: 50-5-225, 50-5-226, 50-5-227, MCA

NEW RULE IV (37.106.2899C) CATEGORY D: STAFF (1) and (1)(a) remain as proposed.

(b) a ~~full-time~~ licensed mental health professional who must be site-based; and

(c) remains as proposed.

(2) through (2)(b) remain as proposed.

(c) complete four hours of annual training related to mental health and mental disorders;

(d) through (3) remain as proposed.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA
IMP: 50-5-225, 50-5-226, 50-5-227, MCA

NEW RULE V (37.106.2899D) CATEGORY D: RESIDENT ASSESSMENTS

A category D facility must obtain or conduct three types of resident assessments for each resident:

(1) Prior to move in, the facility shall obtain the court determination documentation required in ~~50-5-224(3)~~ 53-21-199, MCA, as applicable, as well as a full medical history and physical and mental health and mental disorders assessment.

(2) and (3) remain as proposed.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA
IMP: 50-5-225, 50-5-226, 50-5-227, MCA

NEW RULE VIII (37.106.2899G) CATEGORY D: DISCHARGE (1) through (3) remain as proposed.

(4) All discharges must be discussed with the resident or resident's legal representative and the resident's practitioner to ensure collaboration on a safe and appropriate discharge location.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA
IMP: 50-5-225, 50-5-226, 50-5-227, MCA

4. The department has amended the following rules as proposed: ARM 37.106.2802, 37.106.2803, 37.106.2804, 37.106.2809, 37.106.2810, 37.106.2814, 37.106.2815, 37.106.2817, 37.106.2821, 37.106.2822, 37.106.2824, 37.106.2829, 37.106.2835, 37.106.2836, 37.106.2838, 37.106.2847, 37.106.2849, 37.106.2854, 37.106.2860, 37.106.2866, 37.106.2875, 37.106.2885, 37.106.2896, and 37.106.2904.

5. The department has amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

37.106.2805 DEFINITIONS The following definitions apply in this subchapter:

(1) through (15) remain as proposed.

(16) "Mental health professional" means:

(a) a certified professional person under Title 53, chapter 21, part 1, MCA;

(b) through (f) remain as proposed.

(g) an advanced practice registered nurse, as provided for in 37-8-202, MCA, with a clinical specialty in psychiatric mental health and mental disorders nursing; or

(h) remains as proposed.

(17) through (32) remain as proposed.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA
IMP: 50-5-225, 50-5-226, 50-5-227, MCA

37.106.2816 ASSISTED LIVING FACILITY STAFFING (1) through (2)(a) remain as proposed.

(i) If an applicant has lived outside the state within the past five years, the assisted living facility must complete background checks in every state in which the applicant has resided within the past five years ~~or~~ unless the name-based background check yields nationwide results, or the facility may conduct a~~n~~ FBI fingerprint background check.

(b) remains as proposed.

~~(i) Indications that an employee may pose a risk or threat to the health, safety, and welfare of the residents of the facility include self-reported or otherwise known history of abuse, neglect, or exploitation, pending legal proceedings, currently on parole or probation, or any other indicator the facility determines reasonable.~~

(c) through (9) remain as proposed.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA
IMP: 50-5-225, 50-5-226, 50-5-227, MCA

37.106.2823 RESIDENT AGREEMENT (1) through (1)(c) remain as proposed.

(d) a statement explaining the resident's responsibilities including house rules, the facility grievance policy, facility smoking policy, facility policy regarding pets, and the facility policy on medical and recreational marijuana use~~. A facility policy on medical marijuana must follow 50-46-318 and 50-46-320, MCA~~;

(e) through (2) remain as proposed.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA
IMP: 50-5-225, 50-5-226, 50-5-227, MCA

37.106.2855 INFECTION CONTROL (1) through (1)(c) remain as proposed.

(d) ~~the~~ any other circumstances under which the facility must prohibit employees with a communicable disease or infected skin lesions from direct contact with residents or their food, if direct contact will transmit disease;

(e) through (2) remain as proposed.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA
IMP: 50-5-225, 50-5-226, 50-5-227, MCA

6. The department has repealed the following rule as proposed: ARM 37.106.2886.

7. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: A commenter proposes that anywhere "mental health" is mentioned in the new rules, that it be replaced with "mental disorders" to include neurocognitive disorders, such as Alzheimer's and dementia.

RESPONSE #1: The department agrees with the comment in part and has made changes to New Rules II, IV, V, and ARM 37.106.2805 as appropriate.

COMMENT #2: A commenter proposes that New Rule I and II include a requirement for experience and continuing education in memory/dementia care.

RESPONSE #2: The department does not agree since revisions to another rule that is applicable to all assisted living facilities includes the need for two hours of annual training in dementia care. With the changes to New Rules II and IV, pursuant to the response to Comment #1, some required continuing education will relate to mental health and mental disorders, which includes Alzheimer's and dementia.

COMMENT #3: A commenter requests that category D assisted living facilities be able to attach a secured unit to a skilled nursing facility.

RESPONSE #3: The department does not agree. A, B, C, and the proposed D categorizations are assisted living categorizations and can only be applied to assisted living facilities. If a skilled nursing facility wants to provide category D services, the skilled nursing facility needs to apply for assisted living facility licensure and indicate which categories of assisted living it wants to provide.

COMMENT #4: A commenter suggests expanded dictation on what accounts for the "mental health" training in the requirement. Additionally, the commenter recommends the annual mental health training be reduced to four hours out of the 16 total continuing education hours required for administrators, instead of the proposed eight hours.

RESPONSE #4: See response to Comment #2. Additionally, the Administrative Rules of Montana (ARM) places the full responsibility of the facility, resident care, documentation, etc., on the administrator. Therefore, the department believes it

essential for the category D administrator to have a significant amount of training in mental disorders.

COMMENT #5: A commenter suggests adding the language "The facility must assist with discharge to ensure safe and appropriate placement of the resident" to New Rule VIII.

RESPONSE #5: This requirement is already found in the Assisted Living regulations for discharge, and therefore would apply to a category D endorsement for assisted living facilities.

COMMENT #6: A commenter makes the suggestion to provide clarity on mental illness versus Alzheimer's disease and related dementia.

RESPONSE #6: See response to Comment #1.

COMMENT #7: A commenter requests clarifications to New Rule IV provisions related to a full-time mental health professional, given that a category D facility may not only have mental health residents; requests the requirement for FBI background checks be removed as there are already background check guidelines for assisted living facility staff in place; requests clarification on which staff will need to complete four hours of annual training on mental health and mental disorders, training on de-escalation techniques, and methods of managing behaviors.

RESPONSE #7: The department agrees with the comment and has eliminated the phrase "full-time" and has updated the rule to reflect the changes. Taking into consideration the changes that will be made in response to Comment #1, the language is changed to mental health and mental disorders. Given the title to New Rule IV, "Category D: Staff," it is clear that New Rule IV pertains to staff employed to work in a category D facility.

COMMENT #8: A commenter suggests language be added to New Rule IV stating that the two hours of training in dementia care are to be provided by a memory/dementia care trained professional.

RESPONSE #8: The department does not agree. A definition of such professional would need to be determined as this is not currently a medically recognized profession.

COMMENT #9: A commenter requests clarification if category D can accept a resident who is not on a court-ordered diversion from the Montana State Hospital.

RESPONSE #9: New Rule V will be updated to include "as applicable" to the requirement to obtain a copy of the court determination as it is not a requirement that category D residents be on a court-ordered diversion from Montana State Hospital.

COMMENT #10: A commenter suggests removing the section of New Rule VI that requires each direct-care staff member to document that they have reviewed and are capable of implementing each resident's health care plan.

RESPONSE #10: The department does not agree with this suggestion. Health care plans are developed to identify the needs and goals of residents, who is responsible for carrying out interventions to have those needs and/or goals met, and what services the resident needs. The department believes it is imperative that direct-care staff review and familiarize themselves with individual resident health care plans to ensure that they know how to care for the residents they serve, and how to protect the health, safety, and welfare of the residents. Documentation by signature of staff is acknowledgment of the ability to care for the residents and holds them accountable.

COMMENT #11: A commenter suggests adding the language "all discharges must be discussed with the resident, the resident's legal representative, and the resident's practitioner" in New Rule VIII.

RESPONSE #11: The department agrees and has made changes to New Rule VIII.

COMMENT #12: A commenter indicates that a memory/dementia care trained professional should be required for category D, added to category D regulations, and therefore added to the definitions rule.

RESPONSE #12: See response to Comment #8.

COMMENT #13: A commenter requests clarification on who is "a certified professional" and what certifications meet the requirement.

RESPONSE #13: The department refers to 53-21-106, MCA. The department adds the Montana Code Annotated (MCA) reference to the rule suggestion, in response to this comment.

COMMENT #14: A commenter suggests removing the requirement for facilities to submit new policies for department review.

RESPONSE #14: The department's intent in this requirement is to eliminate the potential that a facility write into policy something that is inconsistent with provision(s) in the ARM or MCA. Depending on current licensure of the facility, it could be up to three years before the department is onsite to review the facility's policies and procedures and finds the noncompliance. The department does not regulate policies that do not pertain to the licensure of the assisted living facility or the care of the residents served.

COMMENT #15: A commenter recommends removing the requirement that assisted living facility providers must obtain background checks from each state an applicant has lived in if they have lived outside of Montana in the last five years.

RESPONSE #15: The department partially agrees with the recommendation. The department has changed wording in ARM 37.106.2816(2)(a)(i) to exclude the need to run individual state background checks if the facility is using a background check company that does a nationwide check.

COMMENT #16: A commenter recommends removing the listed indications that an employee may pose a risk or a threat to the health, safety, and welfare of the residents in an assisted living facility and make the language reflect that of the statute.

RESPONSE #16: The department partially agrees with the recommendation. The department agrees to remove (i) from ARM 37.106.2816(2)(b) listing indications that could pose a risk to health, safety, and welfare of the residents.

COMMENT #17: A commenter suggests removing requirements of two hours initial and annual dementia training, and removal of proposed addition of five rights of medication administration training.

RESPONSE #17: The department does not agree with this suggestion. With an increase in mental disorders in assisted living facilities, initial and annual refresher training is necessary to safely and effectively care for residents. Medication administration training is necessary because most assisted living facilities store and dispense resident medications to their residents. Basic training on medication administration is imperative to ensure the health and safety of the residents receiving their medications.

COMMENT #18: A commenter states support for enacting an annual dementia/cognitive impairment training for staff.

RESPONSE #18: The department agrees with this statement and made relevant revisions to ARM 37.106.2816(3)(g), as proposed.

COMMENT #19: A commenter recommends removing the requirement that assisted living facilities have a marijuana policy.

RESPONSE #19: The department does not agree with this recommendation. With the recent legalization of marijuana, the department's position is that a clear policy on marijuana use safeguards residents and staff.

COMMENT #20: A commenter makes note that the MCA referenced in the proposed requirement for a marijuana policy has been repealed.

RESPONSE #20: The department makes note of the MCA repeal and has removed the MCA reference.

COMMENT #21: A commenter suggests implementing Home and Community Based Services (HCBS) setting rule into the requirement that the resident agreement include a statement explaining resident's responsibilities to the house rules.

RESPONSE #21: The department does not agree with this suggestion. Not all assisted living facilities are HCBS providers. Additionally, the department believes that adding this requirement would create an expectation that the licensure bureau monitor for compliance not only with the agreement, but also with the settings rule since it would be in the resident agreement. The health care facility surveying staff will not be conducting settings evaluations or compliance monitoring for HCBS services.

COMMENT #22: Two commenters stated their support of the changes to the involuntary discharge 30-day notice rule for various reasons.

RESPONSE #22: The department thanks the commenters for their support of these changes.

COMMENT #23: Several commenters did not support the changes to the involuntary discharge 30-day notice rule. Commenters included reasons such as: not in the best interest of the resident, removes responsibility from the facility to find discharge locations, should only be used for when a resident is a danger to themselves or others but not for failure to pay or decline in activities of daily living (ADLs). Some commenters claimed that the addition of the language "the facility must assist with discharge to ensure safe and appropriate placement of the resident" is vague and needs "more teeth" to safeguard residents from being discharged to the streets or homeless shelters.

RESPONSE #23: The department believes that a change to this rule is required to initiate the discharge process for a 30-day notice. The current rule does not allow that the notice of need to discharge even be given to the resident without a confirmed place of discharge indicated on it. The intent of this rule change is to facilitate assisted living providers to be able to start the discharge process without having an exact place of discharge determined before issuing the notice. The facility, pursuant to the addition of (5), would still be responsible for assisting with the discharge during that 30-day notice period. The right to a fair hearing, and the fair hearings process, provides a review to ensure discharges are occurring appropriately.

COMMENT #24: A commenter expresses they do not feel any facility should be allowed to have rooms that house more than two residents. This is in reference to ARM 37.106.2835.

RESPONSE #24: The department disagrees with this comment. Any facility currently housing more than two residents to a room may have a loss of revenue if required to delicense beds due to the number of residents per room. The

department notes that if the facility changes occupancies or owners, the facility is then required to meet current standards which would remove the allowance of more than two residents per room. The rule indicates any previously licensed facility, which by reference would have been a facility licensed before 2004, may retain four residents to a room, but any newly licensed facility, including facilities that go through a change of ownership – as mentioned above – may only have a maximum occupancy of two residents per room.

COMMENT #25: A commenter suggests changing the wording "the" to "any other" in ARM 37.106.2855(1)(d).

RESPONSE #25: The department agrees, and has made changes to the applicable rule.

COMMENT #26: A commenter recommends removing portions of the infection control proposed rules, and referencing adhering to CDC guidance instead.

RESPONSE #26: The department does not agree with these recommendations. During the COVID-19 pandemic, numerous assisted living facilities did not have adequate infection control policies and procedures in place to mitigate widespread infectious disease. Before COVID-19, assisted living facilities were able to send very ill, highly infected residents to hospitals for treatment. Due to over capacitation and staff shortages at hospitals and skilled nursing facilities during the COVID-19 pandemic, assisted living facility providers could not send their infected residents to these facilities. The department finds it necessary that all assisted living facility providers have infectious disease control policies and procedures in place for when they have to track, mitigate, and treat residents with infections/infectious diseases.

COMMENT #27: New Rule I – A commenter states that the entrance/exit to/from the category D unit to the other portion of the assisted living facility be restricted and to require the department to make policies for facilities to maintain security of the facility/unit.

RESPONSE #27: The department agrees in part with this comment. The rule already includes the requirement for an impenetrable door between units if connected. The department disagrees with the suggestion that the department write policies for category D facility security. Policies are the responsibility of each individual facility.

COMMENT #28: New Rule II – A commenter suggests that the requirement for three years of experience be changed to one year and to be verifiable. They suggest the experience must be in administration of mental health. Also, the applicant should be a Montana licensed professional. They suggested that the annual continued education be increased to 24 hours a year, instead of 16.

RESPONSE #28: The department disagrees with these comments. The department does not verify experience of individuals employed at health care

facilities. Requiring a category D administrator to be a licensed Montana professional plus having experience in mental health administration limits the potential pool of individuals eligible to become category D administrators. Since the rules set for numerous other licensed professionals to be involved with the operations of the category D facility, the department believes the requirement of increasing the number of continuing education units per year by eight is unnecessary.

COMMENT #29: New Rule III – A commenter suggests that facilities must allow a resident or legal representative 48 hours to review disclosure documents required in (1) and the administration must be available in those 48 hours to answer any questions.

RESPONSE #29: The department disagrees with this comment. Additional time requested to review documents, and the availability of the administrator for questions can done on a case-by-case basis and determined between the facility and a resident/resident legal representative independently.

COMMENT #30: New Rule IV – A commenter suggests requiring a registered nurse (RN) in the facility eight hours a day, seven days a week, require a full time licensed mental health professional be within the facility, create a staff ratio of 1:5 on category D, and add "criminal background check" to the name based or FBI background check.

RESPONSE #30: The department disagrees with these comments. Facilities are responsible for determining RN coverage based on census, clientele, needs, etc. The department does not agree with creating a staffing ratio as staffing is based on resident needs, not number of residents. The intent of the name-based or FBI background check is that it be used for criminal history evaluation to determine eligibility to work in assisted living facility.

COMMENT #31: New Rule VII – A commenter questions why a category B resident would be in a category D unit.

RESPONSE #31: Residents with category D, like category C, will need dual categorizations applied. The categorization of residents as A/B is to indicate functional level – the extent of assistance they will need for completion of ADLs, or the requirement of skilled services needed for care. Categorization of residents as C/D will be determined based on cognitive/mental disorder. Facilities are responsible to document both the functional, and as appropriate, cognitive/mental status and needs of their residents – i.e., A/C, A/D, B/C, B/D.

COMMENT #32: New Rule VIII – A commenter suggests that discharges be discussed with the resident or resident's legal representative.

RESPONSE #32: See response to Comment #11.

COMMENT #33: ARM 37.106.2803 – Two commenters suggest not repealing ARM 37.106.2886 because they believe it removes responsibility of MAR documentation for category B and category C residents.

RESPONSE #33: The department disagrees with this comment. ARM 37.106.2886 is a duplicate of ARM 37.106.2849. ARM 37.106.2849 applies to category B and C residents, and will also apply to category D residents.

COMMENT #34: ARM 37.106.2805 – A commenter suggests keeping the language "but are not limited to" in ARM 37.106.2805(14).

They suggest to (1) define a certified professional person; (2) require an LPC or LCPC, instead of saying a professional counselor; (3) specify a LMSW instead of a social worker licensed under Title 37, MCA; (4) remove marriage and family therapist; and (5) allow for an advanced practice registered nurse (APRN), but exclude nurse practitioners, nurse-midwives, nurse anesthetists, and clinical nurse specialists in ARM 37.106.2805(15).

They suggest removing the language "other labeled container" and change to "original labeled container" in ARM 37106.2805(25)(c).

They also suggest not removing the "significant event" terminology in ARM 37.106.2805(28).

RESPONSE #34: The department disagrees. The department proposes to replace "but are not limited to" with "include." By definition, "include" means "include, but is not limited to."

The facility is required to ascertain the ability to practice under Title 37, MCA, for professional counselor and social worker and determine if the licensed individual can meet the residents' needs. The rule as written specifies the requirement for an APRN in that scope and does not need to address the types of nursing professionals that are excluded.

A change to "original" is not necessary for the intent of the rule.

The department disagrees because the removal of the definition of "significant event" and the addition of the definition of "significant change" is intended to better serve assisted living residents because "significant change" better encompasses the overall health of the resident and therefore is more accurate in determining level of care and needs in comparison to "significant event."

COMMENT #35: ARM 37.106.2814 – The commenter suggests additional number, timing, and specific training requirements for assisted living providers.

RESPONSE #35: The department disagrees with this comment. The department feels that 16 continuing education units per year is adequate for assisted living

administrators, and there is not a need for all assisted living administrators to receive the proposed additional hours and types of training.

COMMENT #36: ARM 37.106.2815 – A commenter suggests an updated policies and procedures manual be kept on file at the department.

RESPONSE #36: The department disagrees with this comment. The facility is required to maintain an updated policies and procedures manual that is available to staff, residents, legal representatives, and representatives of the department at all times. Thus, it is unnecessary for the department to also maintain a copy of the manual.

COMMENT #37: ARM 37.106.2816 – A commenter suggests requiring that all direct-care staff be over the age of 18, have a high school diploma or General Education Diploma (GED), and be certified nursing assistants (CNA).

They also state that the administrator should provide written documentation of findings of background checks and not allow an applicant to work provisionally pending the results of a background check.

They also recommend additional training including more hours and that specific topics be added to staff training.

They suggest reviews of service plans be documented by staff and a supervisor and should be kept in the staff file for three years after the employee leaves.

They recommend that there should be an increase to two persons per shift trained in cardiopulmonary resuscitation (CPR), provide for staff ratios for category C facilities, and recommend all category C staff must have keys to all relevant areas.

RESPONSE #37: The department disagrees with this comment. The facility determines appropriateness and eligibility of a person to be hired who is of legal age to work. The facility is responsible to train that staff to be able to perform their job duties, which can be done with someone under the age of 18 who has not completed school. Employment of CNAs is optional, but is not required.

The department does not agree that the administrator be the one who is mandated to document, in an employee file, background check results. Other qualified personnel could do this. MCA provides the ability to work provisionally pending background check. Not to permit such provisional work would be inconsistent with the law.

Additionally, training for staff and amounts of training are left to the discretion of the facility since all assisted living facilities are different in size and serve different clientele.

The department does not see any reason why having two CPR certified staff per shift is necessary.

The review of and documentation of review of a resident service plan is part of a resident file, not staff file, so the proposal that this be kept in a staff file is unnecessary.

The department disagrees with creating staffing ratio as staffing should be based on resident needs, not number of residents. One staff on shift with keys to all relevant areas within a facility is adequate to meet needs for facility operations and resident health safety and welfare.

COMMENT #38: ARM 37.106.2817 – A commenter suggests requiring the employee, administrator, and certified trainer to sign documentation of employee initial orientation and training received prior to entering category C facility, include the wording "name and/or FBI fingerprint and" into the requirement to keep the results of the employee criminal background check in the employee file.

RESPONSE #38: The department disagrees with these comments. There is no requirement, or definition, of a certified trainer for assisted living facility staff. The administrator, pursuant to ARM 37.106.2814, is already responsible for oversight of all facility functions, including staff training and documentation which would encompass employee orientation documentation. The department does not feel reiteration is needed.

COMMENT #39: ARM 37.106.2821 – A commenter suggests the department specify that the RNA include current Primary Care Physician prescribed medication instead of just current medication, require that a licensed healthcare provider (LHCP), as defined in ARM 37.106.2805, be designated to do the assessment of a resident when a resident or facility is appealing a rejection or relocation decision, and that this nurse not be affiliated with the facility or the state.

RESPONSE #39: The department disagrees with these comments. The purpose of having current medication on the RNA is for it to represent the complete picture of all medications taken by the resident. If a resident has more than one doctor, the RNA would not include all the resident's medications if it were to only encompass the medications prescribed by one provider. The state cannot collect money for an assessment and assign an assessment to be completed by a LHCP if that individual does not work for the department.

COMMENT #40: ARM 37.106.2822 – The review of the service plan will include personal contact with the resident or resident's legal representative, and if the resident is in category C the legal representative must be present.

RESPONSE #40: The department disagrees with this comment. While the department expects that involvement of the resident or resident legal representative would be part of the interdisciplinary group, it will not mandate personal contact or

that a legal representative be present at the service plan review. Such requirements could be unreasonable because there are many situations where legal representatives are in a different state than the resident or are unreachable by phone during times of review.

COMMENT #41: ARM 37.106.2823 – A resident or resident legal representative shall be given 48 hours' notice to review resident agreement before signing, the agreement must include criteria for requiring transfer within the facility or if to another facility, and the facility must fully explain all appendix, addendums, and disclosures.

RESPONSE #41: The department disagrees with this comment. This is not a licensing issue, and arrangements such as these could be made between the provider and the resident/resident legal representative independently.

COMMENT #42: ARM 37.106.2824 – (1)(b) and (c) should pertain to only category A facilities, there should not be removal of the requirement to have the discharge location on the 30-day notice, and there should be separate rules for discharges for category C residents.

RESPONSE #42: The department disagrees with these comments. See response to Comment #23. Residents within assisted living facilities all have the same discharge criteria and there is not discrimination based on categorization.

COMMENT #43: ARM 37.106.2829 – Keep the requirement of a resident application form, require category B and C residents to be weighed more frequently, and do not remove the requirement to ascertain a provider's response to a significant event.

RESPONSE #43: The department disagrees with this comment. The application process is outdated. With more residents coming from acute care settings to assisted living facilities, it is difficult to require applications when transfers are referrals from other facilities such as a hospital or skilled nursing facility. The department sees no rationale as to why a category B or C resident would need to be weighed more frequently than a category A resident. If a resident is experiencing weight fluctuations, a practitioner can order treatment or increased monitoring on a case-by-case basis. The department removes the rule stating that a facility must maintain documentation of the provider's response to an event because it may not be reasonably achieved because neither the facility nor the licensing department has control over whether a provider or practitioner responds to the report of a significant event.

COMMENT #44: ARM 37.106.2847 – Include notification to the resident's legal representative of refusal of medications, changes to the dose or schedule of medications on the MAR by recorded by an appropriate LHCP.

RESPONSE #44: The department disagrees with these comments. Residents have the right to privacy and can determine for themselves who they want to know about their medical conditions and medications, and if they have a legal representative, the facility has the responsibility for determining what rights the legal representative may have based on the documents by which the legal representation was established. The requirement that a LHCP be the person to make changes to the MAR in schedules or doses is not attainable as there is no requirement to have a LHCP on shift at all times, and medication doses or schedules need to be documented timely.

COMMENT #45: ARM 37.106.2849 – Add legal representative to notification of medication errors and add requirement that PRN medication only be refilled when there is a seven day or less supply.

RESPONSE #45: The department disagrees with these comments. See response to Comment #44. The department does not direct facilities on refilling medications as that is between the facility and the dispensing pharmacy.

COMMENT #46: ARM 37.106.2855 – Add the requirement that a staff member must have a doctor's release to return to work after having a communicable disease.

RESPONSE #46: The department disagrees with this comment. The facility is responsible to set standards for ensuring staff who have had a communicable disease are safe to return to work. A requirement to have a doctor's order to return to work could delay an eligible person's ability to return to work substantially if the person had to wait to be seen by a doctor, which could result in loss of wages for the staff, and insufficient staff coverage for the facility.

COMMENT #47: ARM 37.106.2860 – Keep the requirement of adhering to ARM Title 37, chapter 110, subchapter 2.

RESPONSE #47: The department removed this requirement because, except for ARM 37.110.201, this entire subchapter has been repealed. ARM 37.110.201 provides MCA references for retail food establishments under Department of Labor and Industry (DLI). Assisted living facilities are not required to abide by these standards as not all assisted living facilities sell retail food. Those that do would have their food retail establishment reviewed and certified by DLI.

COMMENT #48 ARM 37.106.2866 – Require that fire drills be full evacuation drills and be done in a time frame established by the local fire jurisdiction and require that all drills include documentation of the amount of time it took to evacuate all residents.

RESPONSE #48: The department disagrees with these comments. The local fire jurisdiction has the authority to require facilities to perform full evacuation drills and the department requires facilities to adhere to the requirements established by their local jurisdiction. There is no need for the department to include such specific requirements on the subject in its regulations.

COMMENT #49: ARM 37.106.2875 – Require that the review/update of the health care plan be in consultation with the resident, resident legal representative, and resident LHCP, and that the health care plan be readily available to the resident and/or the resident's legal guardian.

RESPONSE #49: The department disagrees with adding this language to the rule. The intent of the rule is that those responsible for the health care plan – which would include the resident or their legal representative – would all be involved in the review and update. Health care plans are not meant to be an internal document, but instead, a document used as a guide to provide care.

COMMENT #50: ARM 37.106.2885 – Change the requirement that orders received over the phone are confirmed by written orders in 24 hours instead of 21 days, add that a resident could be categorized B "or C" resident if the resident is unable to request or validate need for PRN medication, require the facility to report refusal of medication to the legal representative, and remove the unlicensed individual portion of (c) and change to Medication Aide I or II.

RESPONSE #50: The department disagrees with these comments. The assisted living facility cannot ensure a doctor will put into writing a telephone order within 24 hours. The addition of "or C" for classification of whether or not a resident can request/confirm need for PRN medication is unnecessary, as the designation of category C is related to their cognitive ability with respect to basic care decisions and elopement, not medication administration. See response to Comment #44. The rule that permits an unlicensed individual to administer medications under the delegation of an individual licensed by the Montana Board of Nursing already includes Medication Aide I persons, as these individuals are not licensed, but certified. There are additional identified unlicensed individuals who can be delegated to give medications, as determined by the Montana Board of Nursing; the department supports the delegation standards set forth by the Montana Board of Nursing and, accordingly, maintains the current language.

COMMENT #51: ARM 37.106.2896 – Require the disclosures to category C legal representatives be given in writing and in person, and that the disclosure must include the evidence-based dementia care training program used at the facility.

RESPONSE #51: The department disagrees with these comments. The requirement to have legal representatives be given information in person would be unattainable in situations where legal representatives are not in the same town or state as the resident. There is no requirement for, or definition of, an "evidence-based dementia care training program" and therefore the department cannot make it a requirement. Each facility is responsible for making a determination on training to ensure that staff can adequately perform their job duties and ensure the health, safety, and welfare of the residents in its facility.

/s/ FLINT MURFITT
Flint Murfitt
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.71.107, 37.71.110, 37.71.404, 37.71.601, and 37.71.602 pertaining to low income weatherization assistance program	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-984 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1477 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has amended the above-stated rules as proposed.

3. No comments or testimony were received.

/s/ HEIDI SANDERS
Heidi Sanders
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.36.604 pertaining to financial eligibility criteria	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On May 27, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-985 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 782 of the 2022 Montana Administrative Register, Issue Number 10. A public hearing was held on June 16, 2022. On August 5, 2022, the department published an amended notice of public hearing and extension of comment period on the proposed amendment of the above-stated rule at page 1483 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has amended the above-stated rule as proposed.

3. No comments or testimony were received.

4. The department intends to apply the rule amendment retroactively to January 12, 2022. A retroactive application of the rule amendment does not result in a negative impact to any affected party.

/s/ CHAD G. PARKER
Chad G. Parker
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.97.132, 37.106.301, 37.106.302, 37.106.316, 37.106.401, 37.106.601, 37.106.704, 37.106.804, 37.106.1505, and 37.106.2311 and the repeal of ARM 37.106.605, 37.106.645, 37.106.1101, 37.106.1103, 37.106.1104, 37.106.1105, 37.106.1110, 37.106.1111, 37.106.1112, 37.106.1120, 37.106.1121, 37.106.1122, 37.106.1123, 37.106.1124, 37.106.1130, 37.106.1131, and 37.106.1132 pertaining to Health Care Facility Revisions	)	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On August 5, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-990 pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules at page 1485 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has amended the above-stated rules as proposed.

3. The department has repealed the above-stated rules as proposed.

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: A commenter indicates that they feel that, for skilled nursing facilities, state hospitals, veteran nursing home, and other congregate settings, the "State Department" needs to ensure that these facilities are following the 2016 HCBS community settings rules if they are receiving Home and Community Based funding.

RESPONSE #1: The department disagrees with this comment. The health care facilities regulations establish minimum standards for all health care facilities for licensure purposes. They do not set forth specific requirements for facilities based on the types of reimbursement received or their participation in certain programs. Additionally, facilities providing home and community based services are already

monitored for compliance and applicability by Montana Medicaid and the department's Senior and Long Term Care Division.

/s/ FLINT MURFITT
Flint Murfitt
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.62.106 and 37.62.307 pertaining to Child Support Services Division guidelines and distribution	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-995 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1508 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has amended the above-stated rules as proposed.

3. No comments or testimony were received.

/s/ CHAD G. PARKER
Chad G. Parker
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.70.601, 37.70.607, and 37.70.608 pertaining to low income home energy assistance program	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-996 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1511 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has amended the above-stated rules as proposed.

3. No comments or testimony were received.

/s/ HEIDI SANDERS
Heidi Sanders
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the repeal of ARM 37.110.401, 37.110.402, 37.110.405, 37.110.406, 37.110.407, 37.110.410, 37.110.411, 37.110.412, 37.110.413, 37.110.414, 37.110.420, 37.110.421, 37.110.422, 37.110.427, 37.110.428, and 37.110.429 pertaining to vending of food and beverages	)	NOTICE OF REPEAL

TO: All Concerned Persons

1. On August 5, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-997 pertaining to the proposed repeal of the above-stated rules at page 1518 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has repealed the above-stated rules as proposed.

3. No comments or testimony were received.

/s/ ROBERT LISHMAN
Robert Lishman
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.10.101, 37.10.104, 37.10.105, and 37.10.108 pertaining to living wills	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-999 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1522 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has amended the above-stated rules as proposed.

3. No comments or testimony were received.

/s/ ROBERT LISHMAN
Robert Lishman
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the repeal of ARM 37.89.103, 37.89.106, 37.89.112, 37.89.114, 37.89.115, 37.89.118, 37.89.119, 37.89.125, 37.89.131, 37.89.501, 37.89.503, 37.89.505, 37.89.507, 37.89.509, 37.89.521, 37.89.523, 37.89.525, 37.89.531, and 37.89.541 pertaining to crisis system restructuring	)	NOTICE OF REPEAL

TO: All Concerned Persons

1. On August 5, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-1003 pertaining to the public hearing on the proposed repeal of the above-stated rules at page 1526 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has repealed the above-stated rules as proposed.

3. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: One commenter requested information regarding how the crisis system restructuring would impact Montana's three crisis centers answering 988 calls.

RESPONSE #1: The proposed rule changes will not affect 988 calls in Montana. The three crisis centers currently answering 988 calls will continue to do so. Montana's crisis system restructuring is intended to align crisis services in Montana with the nationally recognized Crisis Now Model -- someone to call, someone to respond, and somewhere to go. 988 provides the "someone to call" portion of this model. It is the goal of the department to align our state funded crisis programs with our Medicaid funded programs to increase access to services, improve service delivery, fill current gaps in the continuum of care, and streamline utilization and outcome reporting for crisis services.

COMMENT #2: One commenter requested information regarding how the removal of the 72-hour program would affect individuals above 150% federal poverty level (FPL) including information regarding the demand for services from such individuals.

RESPONSE #2: Because the 72-hour program does not have income requirements, the department does not track income levels of people receiving

services under the 72-hour program. Therefore, the department does not know what the demand has been for the 72-hour program by individuals above 150% of FPL. With adoption of this rule notice, the department is providing an expanded scope of non-Medicaid services to eligible Montanans who fall below 150% FPL. The department will monitor this program and the funding constraints inherent in a program that is not an entitlement to determine over time if it is viable to expand the program to individuals who are above 150% FPL.

/s/ BRENDA K. ELIAS
Brenda K. Elias
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.51.306 pertaining to foster care immunization requirements	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-1005 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1531 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has amended the above-stated rule as proposed.

3. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: Several commenters offered support for the proposed changes, stating the rule changes would increase the number of potential foster parents, specifically those from faith communities.

RESPONSE #1: The department acknowledges that the proposed changes may provide opportunities to increase the number of available resource families who are connected to faith communities. The department appreciates the support.

COMMENT #2: Several commenters expressed general support for the amendments as they will reduce barriers for people wanting to be licensed as foster parents, and make it easier for otherwise qualified Montanans to be licensed as foster care parents.

RESPONSE #2: The department appreciates the support.

COMMENT #3: Two commenters suggested that currently licensed foster families should be able to use a religious exemption; the language seems to limit utilization by currently licensed foster parents who evolve in their religious beliefs and become opposed to vaccinations after licensing.

RESPONSE #3: The department appreciates the opportunity to clarify that the proposed changes would apply during initial licensure and any subsequent re-licensure.

COMMENT #4: Two commenters indicated that they are unable to be considered as possible adoptive parents because of the current vaccination rules.

RESPONSE #4: The department clarifies that the current and proposed vaccination rules apply only to foster care licensing and are not a requirement for families seeking to be approved only for adoptive placements. Eligibility regulations regarding state child adoption services may be found in ARM 37.52.101 through 37.52.125.

COMMENT #5: One commenter expressed concern that foster parents would be allowed to make immunization decisions for children placed in their care under these proposed changes.

RESPONSE #5: The department clarifies that the proposed changes allow foster parents to claim a religious exemption for their own children. Birth parents and the department will continue to make health care decisions, as appropriate, for children in foster care. Foster parents are required to respect the religious beliefs or practices of the foster children placed in their home. (*See* ARM 37.51.806.)

COMMENT #6: Several commenters stated that the proposed changes should not occur because foster children are often under-vaccinated, have other medical issues, and are at greater risk of contracting life-threatening diseases.

RESPONSE #6: The department appreciates these comments. The department seeks to ensure that foster care vaccination requirements (and foster care religious exemptions) are consistent with Montana's newly enacted Religious Freedom Restoration Act (MT RFRA). MT RFRA provides that State action may not substantially burden a person's right to the exercise of religion unless the action is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. Under case law interpreting the federal RFRA – which would likely be applied in interpreting MT RFRA – only those governmental interests of the highest order can outweigh free exercise claims, and such interests must be evaluated not in broad generalities, but as applied to the particular person who would claim an exemption.

The rules regarding the physical care of children in foster care require these children's medical needs to be met. Each child must receive a medical screening within 30 days of placement in foster care and, if medically necessary and in accordance with the child's or birth parent's religious practice, receive necessary vaccinations. (*See* ARM 37.51.806 and 37.51.825.) Foster parents are also required to keep the placing agency appraised of any illnesses for which a foster child required medical attention, and the results of any examinations, tests, and treatment recommendations. (*See* ARM 37.51.825(6)).

The department believes that the proposed rule changes, coupled with existing regulations, appropriately balance the requirements of the MT RFRA and the department's obligation to protect the wellbeing of children in foster care. The illness reporting regulation helps ensure the department is monitoring and responsive to the medical needs of children receiving foster care.

COMMENT #7: One commenter stated that rules should not change because the current immunization requirements do not pose an undue burden on foster care families as required by the Religious Freedom Restoration Act.

RESPONSE #7: The department relies on its above response to Comment #6.

COMMENT #8: Two commenters indicated that the state was not in compliance with the National Model Foster Family Licensing Standards and could potentially lose funding with this change.

RESPONSE #8: The department is aware of the Model Licensing Standards. The standards are not a requirement for states but a suggested standard to be considered. The department has previously notified the Children's Bureau that they were not in compliance with other items in the Model Standards; the notification did not result in a loss of funding. The department anticipates the same as the result of these rule changes. The department further notes that any federal requirements are subject to the federal Religious Freedom Restoration Act of 1983. 45 U.S.C. 2000bb *et seq*.

COMMENT #9: One commenter indicated that individuals who generally oppose vaccination will use religious exemptions as there is no department review of the veracity of claimed religious tenets.

RESPONSE #9: The department will require a notarized affidavit from any individual requesting a religious exemption, attesting that receipt of a vaccine or vaccines is contrary to an individual's religious belief, observance, or practice. Making false statements in the licensing process can result in negative licensing action, including denial of licensure. Additionally, under Montana law, it is a misdemeanor to falsely attest pursuant to 45-7-202, MCA, and is punishable by a fine not to exceed $500, imprisoned in the county jail for a term not to exceed six months, or both.

/s/ HEIDI SANDERS
Heidi Sanders
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.82.1107 pertaining to medically needy living allowance deduction	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-1008 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1536 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has amended the above-stated rule as proposed.

3. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: Three commenters offered general support for the increased personal needs allowance and annual cost of living adjustment (COLA).

RESPONSE #1: The department agrees that increasing the personal needs allowance and annual COLA will benefit many disabled and aged individuals.

COMMENT #2: One commenter provided comments about wanting a different baseline for the working disabled and those in assisted living facilities.

RESPONSE #2: While the department appreciates the feedback, this is outside the scope of this rulemaking package.

COMMENT #3: One commenter provided comments about overhauling the entire Medicaid program, specifically the Medically Needy, Waiver, and Expansion populations.

RESPONSE #3: While the department appreciates the feedback, this is outside the scope of this rulemaking package.

COMMENT #4: Two commenters provided comments about the assisted living room and board rates. Specifically, these commenters suggested that assisted living facilities should also receive a rate increase for room and board, allowing facilities to charge more and capture all, or a portion of, the increased amount of funds available to Medicaid-covered residents under these proposed rule changes.

One of the commenters also expressed concern that Medicaid recipients would experience an accumulation of resources under these proposed changes, which could affect their eligibility.

RESPONSE #4: The department thanks the commenters for their comments. The assisted living room and board rates are outside the scope of this rulemaking package. The department believes it has met the legislative intent of the appropriation to increase the amount of funds available to Montanans participating in the Medically Needy program to spend on non-medical related living expenses, which are broader than room and board.

Additionally, the department maintains its position that the personal needs allowance has not been adjusted for years and has not kept pace with inflation, making these changes necessary. The department does not anticipate that these rule changes will result in eligibility-affecting accumulations of funds.

COMMENT #5: One commenter provided comments about the impact on small business and the effective date of the rule.

RESPONSE #5: The rule does not have an impact to small business. The proposed increase in the living allowance deduction impacts individuals. The effective date for this rule is retroactive to January 1, 2022, which is allowable because a retroactive application of the proposed rule amendment does not result in a negative impact to any affected party.

/s/ HEIDI SANDERS
Heidi Sanders
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I through XX, amendment of ARM 37.27.101, 37.27.102, 37.27.105, 37.27.106, 37.27.107, 37.27.115, 37.27.116, 37.27.120, 37.27.902, 37.88.101, 37.106.1411, 37.106.1413, 37.106.1415, 37.106.1420, 37.106.1425, 37.106.1430, 37.106.1432, 37.106.1435, 37.106.1440, 37.106.1450, 37.106.1452, 37.106.1454, 37.106.1460, 37.106.1470, 37.106.1475, 37.106.1480, and 37.106.1485, and repeal of ARM 37.27.108, 37.27.121, 37.27.136, 37.27.137, 37.27.138, 37.106.1401, 37.106.1462, 37.106.1482, 37.106.1487, and 37.106.1491 pertaining to state approval of substance use disorder programs, licensure of substance use disorder facilities, and the Behavioral Health and Developmental Disability Medicaid & Non-Medicaid Manuals	)	NOTICE OF ADOPTION, AMENDMENT, AND REPEAL

TO: All Concerned Persons

1. On August 5, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-1010 pertaining to the public hearing on the proposed adoption, amendment, and repeal of the above-stated rules at page 1539 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has adopted the following rules as proposed: New Rules I (37.27.122), II (37.27.117), III (37.27.118), IV (37.27.119), V (37.89.201), VI (37.106.1416), VII (37.106.1426), VIII (37.106.1427), IX (37.106.1434), X (37.106.1455), XI (37.106.1457), XII (37.106.1466), XIII (37.106.1467), XVII (37.106.1469), and XVIII (37.106.1468).

3. The department has adopted the following rules as proposed but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE XIV (37.106.1473) ASAM 3.5 CLINICALLY MANAGED HIGH INTENSITY RESIDENTIAL (ADULT)/MEDIUM INTENSITY RESIDENTIAL (ADOLESCENT) SUBSTANCE USE DISORDER FACILITY REQUIREMENTS

(1) To be licensed to provide ASAM 3.5 services as outlined in the ASAM Criteria, a SUDF must provide on-site 24-hour awake staffing and meet the following staffing requirements:

(a) a physician, physician assistant, or advanced practice registered nurse acting within the scope of the license issued by the Department of Labor and Industry available for consultation within 24 hours in person or by telephone;

(a) through (d) remain as proposed, but are renumbered (b) through (e).

~~(e)~~(f) rehabilitation aides in sufficient number to provide ~~on-site 24 hours a day, seven days a week staffing to assure the safety of clients and to provide~~ direct care support services ~~and supervision of clients~~ as outlined in the clients' individualized treatment plans.

(2) Daily clinical skilled treatment services, in addition to ~~and~~ other scheduled ~~skilled treatment~~ psychosocial rehabilitation services, must be provided on-site a minimum of ~~seven~~ 30 hours ~~(four hours for adolescent programs)~~ per ~~day~~ week.

(3) through (5) remain as proposed.

AUTH: 50-5-103, MCA
IMP: 50-5-103, MCA

NEW RULE XV (37.106.1472) ASAM 3.3 CLINICALLY MANAGED POPULATION-SPECIFIC HIGH INTENSITY RESIDENTIAL (ADULT ONLY) SUBSTANCE USE DISORDER FACILITY (1) To be licensed to provide ASAM 3.3 services as outlined in the ASAM Criteria, a SUDF must provide on-site 24-hour awake staffing and meet the following staffing requirements:

(a) a physician, physician assistant, or advanced practice registered nurse acting within the scope of the license issued by the Department of Labor and Industry available for consultation within 24 hours in person or by telephone;

(a) through (d) remain as proposed, but are renumbered (b) through (e).

~~(e)~~(f) rehabilitation aides in sufficient number to provide ~~on-site 24 hours a day, seven days a week staffing to assure the safety of clients and to provide~~ direct care support services ~~and supervision of clients~~ as outlined in the clients' individualized treatment plans.

(2) Daily ~~scheduled~~ clinical skilled treatment services in addition to other scheduled psychosocial rehabilitation services must be provided on-site. Services must be adapted to the client's developmental stage and level of comprehension in accordance with the client's individualized treatment plan.

(3) through (5) remain as proposed.

AUTH: 50-5-103, MCA
IMP: 50-5-103, MCA

NEW RULE XVI (37.106.1471) ASAM 3.1 CLINICALLY MANAGED LOW INTENSITY RESIDENTIAL (ADULT OR ADOLESCENT) SUBSTANCE USE DISORDER FACILITY (1) through (1)(c) remain as proposed.

(d) rehabilitation aides in sufficient numbers to provide ~~on-site 24 hours a day, seven days a week staffing to assure the safety of clients and to provide~~ direct care support services ~~and appropriate supervision of clients~~ as outlined in the clients' individualized treatment plans.

(2) Weekly scheduled clinical skilled treatment services in addition to other scheduled psychosocial rehabilitation services must be provided on-site or off-site a minimum of five hours per week. Documentation of skilled treatment services provided both on-site and off-site must be available at the facility.

(3) and (4) remain as proposed.

AUTH: 50-5-103, MCA
IMP: 50-5-103, MCA

NEW RULE XIX (37.106.1457) COMMUNICABLE DISEASE CONTROL

(1) through (3) remain as proposed.

(4) Facilities must implement TB ~~protocols~~ screening for all staff members and clients based upon an annual TB Risk assessment as set forth by the Montana Tuberculosis Prevention and Control Program pursuant to ARM Title 37, chapter 114, subchapter 10. Risk assessment and TB manuals are found at https://dphhs.mt.gov/publichealth/cdepi/diseases/Tuberculosis/.

AUTH: 50-5-103, MCA
IMP: 50-5-103, MCA

NEW RULE XX (37.106.1456) CARE MANAGEMENT (1) remains as proposed.

(2) A care manager must have a bachelor's degree in a human services field, an equivalent combination of education and experience, or a minimum of two years of experience serving individuals with behavioral health issues. Evidence of experience must be documented in the employee personnel record.

(3) through (4)(d) remain as proposed.

(e) the ability of the ~~targeted~~ care manager to contact an advocacy organization if the care manager believes the SUDF is unresponsive to the needs of the client.

AUTH: 50-5-103, MCA
IMP: 50-5-103, MCA

4. The department has amended the following rules as proposed: ARM 37.27.101, 37.27.105, 37.27.106, 37.27.107, 37.27.116, 37.27.902, 37.88.101, 37.106.1411, 37.106.1415, 37.106.1420, 37.106.1430, 37.106.1432, 37.106.1440, 37.106.1450, 37.106.1452, 37.106.1454, 37.106.1460, 37.106.1470, and 37.106.1485.

5. The department has amended the following rules as proposed but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

37.27.102 DEFINITIONS In addition to the terms defined in 53-24-103, MCA:

(1) through (3) remain as proposed.

(4) "Biopsychosocial assessment" means ~~an evaluation of the client's strengths, resources, preferences, limitations, problems, needs, and priorities as~~ a comprehensive multidimensional assessment process that includes risk ratings, addresses immediate needs, and is organized in accordance with the six dimensions described in the ASAM Criteria and meets the requirements described in the BHDD Medicaid Manual.

(5) "Continuing care plan" means a ~~discharge or recovery management~~ plan for when a client is discharged or transferred from a particular level of care as described in the BHDD Medicaid Manual.

(6) and (7) remain as proposed.

(8) "Licensed addiction counselor (LAC)" means an individual licensed under requirements pursuant to Title 37, chapter 35 MCA, and ARM Title 24, chapter 219, subchapter 50, to provide addiction counseling. References in ~~this subchapter~~ ARM 37.27.107 to a LAC do not include an addiction counselor licensure candidate registered pursuant to Title 37, chapter 35, part 2, MCA.

(9) through (16) remain as proposed.

AUTH: 53-24-204, 53-24-208, 53-24-209, 53-24-215, MCA
IMP: 53-24-204, 53-24-208, 53-24-209, 53-24-215, MCA

37.27.115 ALL STATE APPROVED PROGRAMS – ACCEPTANCE OF PERSONS INTO THE TREATMENT PROGRAM (1) and (2) remain as proposed.

(3) The program shall work together with the client to implement ~~an~~ a written individualized~~, written~~ treatment plan that identifies services and supports needed to address problems and needs identified in the biopsychosocial assessment. The individualized treatment plan ~~includes goals, objectives, and strategies. It~~ is maintained on a current basis for each client.

(4) and (5) remain as proposed.

AUTH: 53-24-209, MCA
IMP: 53-24-209, MCA

37.27.120 ALL STATE APPROVED PROGRAMS – ORGANIZATION AND MANAGEMENT (1) through (1)(i) remain as proposed.

(j) Programs will submit ~~participate in~~ quarterly updates ~~with~~ to the department to ensure contact information, organizational chart, locations, hours of operation, and services provided are up to date ~~for the public to obtain access to care~~.

AUTH: 53-24-204, 53-24-207, 53-24-208, MCA
IMP: 53-24-208, 53-24-209, 53-24-306, MCA

37.106.1413 DEFINITIONS In addition to the terms defined in 53-24-103, MCA, the following definitions shall apply in the interpretation and enforcement of the rules in this subchapter:

(1) through (9) remain as proposed.

(10) "Continuing care plan" means a ~~provision of the treatment~~ plan outlining anticipated interventions needed at the time of discharge or transfer to another level of care.

(11) through (14) remain as proposed.

(15) "Educational group" means structured service provided in a group setting designed to educate clients about substance abuse and the consequences of substance abuse. ~~It may be provided by rehabilitation aides or other direct care staff.~~

(16) through (28)(a) remain as proposed.

(b) participant name~~s~~;

(c) through (34) remain as proposed.

(35) "Skilled treatment services" means structured services such as individual and group counseling, medication management, family therapy, educational groups, ~~psychosocial rehabilitation,~~ occupational and recreational therapy, and other therapies provided to the client. Skilled treatment services do not include attendance at self/mutual help meetings, volunteer activities, or homework assignments such as watching videos, journaling, and workbooks. Skilled treatment services must be provided by clinical staff licensed pursuant to requirements adopted under Title 37, MCA.

(36) through (40) remain as proposed.

AUTH: 50-5-103, 53-24-208, 53-24-301, MCA
IMP: 50-5-101, 50-5-103, 53-24-208, 76-2-411, MCA

37.106.1425 GOVERNANCE AND ADMINISTRATION (1) The substance use disorder facility (SUDF) must establish a governing body or oversight committee with responsibility for operating and maintaining the SUDF.

(2) The governing body or oversight committee must provide organizational oversight to ensure that adequate resources are available to ensure staff members provide safe and adequate care.

(3) The governing body or oversight committee must establish written policies and procedures that:

(a) remains as proposed.

(b) establish procedures for selecting and periodically evaluating a qualified administrator to ensure the administrator carries out the goals and policies of the governing body or oversight committee;

(c) through (e) remain as proposed.

(f) include annual review of the quality improvement report by the governing body or oversight committee.

(4) through (5)(a) remain as proposed.

(b) be available, or ensure a designated alternate who has similar qualifications is available, to carry out the goals, objectives, and standards of the

governing body or oversight committee and to implement the rules of this subchapter; and

(c) review progress on the quality improvement plan with the governing body or oversight committee on a quarterly basis.

(6) remains as proposed.

AUTH: 50-5-103, 53-24-208, MCA
IMP: 50-5-101, 50-5-103, 53-24-301, MCA

37.106.1435 TRAINEES/INTERNS OR VOLUNTEER REQUIREMENTS

(1) and (1)(a) remain as proposed.

(b) a description of the training ~~/~~ or volunteer work to be provided at the SUDF for trainees, interns, or volunteers, respectively, and any limitations;

(c) through (4) remain as proposed.

AUTH: 50-5-103, 53-24-208, MCA
IMP: 50-5-101, 50-5-103, 53-24-208, MCA

37.106.1475 ASAM 3.7 MEDICALLY MONITORED INTENSIVE INPATIENT REQUIREMENTS (1) and (2) remain as proposed.

(3) Daily clinical skilled treatment services and medical services must be provided on-site by an interdisciplinary team seven days a week.

(4) through (7) remain as proposed.

AUTH: 50-5-103, 53-24-208, MCA
IMP: 50-5-101, 50-5-103, 53-24-208, 53-24-209, 76-2-411, MCA

37.106.1480 WITHDRAWAL MANAGEMENT PROGRAM REQUIREMENTS

(1) through (1)(h) remain as proposed.

(i) The SUDF must provide daily clinical skilled treatment services to address the needs of each client. Clinical skilled treatment services may include medical services, individual and group therapy, and withdrawal support as required in the client's individualized treatment plan.

(j) through (3) remain as proposed.

AUTH: 50-5-103, 53-24-208, MCA
IMP: 50-5-101, 50-5-103, 53-24-208, 53-24-209, 76-2-411, MCA

6. The department has repealed the above-stated rules as proposed.

7. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: A commenter recommended the department combine crisis receiving and stabilization into one policy and approach it as a tiered system instead of separating the services into two different and distinct services. The commenter

also recommended removing hospital as an allowable provider type and adding Federally Qualified Health Centers (FQHC) and Certified Community Behavioral Health Clinics (CCBHC). In addition, the commenter recommended adding quality measures to the services.

RESPONSE #1: The department agrees with the suggestion of combining crisis receiving and stabilization into one policy and will make the recommended changes to combine Policies 450 and 451. The department also agrees with removing hospitals from the allowable provider type. Section 53-21-1203, MCA, however, requires that the department allow reimbursement for short-term inpatient treatment. Therefore, the department will move reimbursement for hospital-based crisis stabilization into the Crisis Diversion Grant program. The department will take the recommendation to add FQHCs and CCBHCs into consideration for a future rulemaking.

COMMENT #2: A commenter stated that the concurrent services policy appears to be "arbitrary and unnecessarily confusing." The commenter provided a detailed review of the concurrent services table found in Policy 230 and provided suggestions for alternate options.

RESPONSE #2: The department will review Policy 230 to ensure that the concurrent services table is accurate and reflects any changes made through this rulemaking. In response to this comment, the department has amended the policy to provide better clarification and address some of the recommendations and to ensure alignment with criteria established by the American Society of Addiction Medicine (ASAM), including permitting: 1) mental health outpatient therapy to be billed concurrently with SUD services; 2) specimen collection for drug testing to be reimbursed concurrently with all services except acute inpatient hospital and partial hospitalization; and 3) BHGH/AFC to be billed concurrently with SUD OP/ASAM 2.1/ASAM 2.5. The department will take the commenter's other suggestions into consideration for future rulemaking.

COMMENT #3: A commenter submitted multiple questions regarding Policy 460, Program for Assertive Community Treatment (PACT), which are outside the scope of this administrative rulemaking proposal.

RESPONSE #3: The department acknowledges receipt of these questions and will reach out to the commenter to provide training or technical assistance to address the questions that fall outside of this administrative rulemaking proposal.

COMMENT #4: Several comments were received supporting the Governor's HEART initiative and appreciative of the department's work on the proposed rules.

RESPONSE #4: The department acknowledges and appreciates the comments.

COMMENT #5: A commenter stated that Policy 525 (ASAM 2.1) no longer allows for high- and low-tier considerations within that level of care. Under the current

system, the policy allowed reimbursement under the low tier if the client was attending some treatment, but not fully engaged. The commenter stated this circumstance prompts the clinic to either get the client engaged or change the client's level of care to a higher or lower level of care. Some treatment is better than no treatment, and this is going to result in fewer ASAM 2.1 clients in the state.

RESPONSE #5: This rulemaking represents the department's intention to align the rules and policies with the ASAM Criteria. The department notes that the tiered billing structure under the current policy is not aligned with ASAM Criteria. Under the criteria, ASAM 2.1 programs provide a minimum of nine hours per week of skilled treatment services for adults and six hours per week of skilled treatment services for adolescents. The department made an allowance in Policy 525 for providers to bill the bundled rate for up to two if the client does not meet the minimum hourly requirement, which should provide some flexibility. The proposed changes to the policy allow the department to be aligned with the ASAM Criteria regarding the minimum required hours of skilled treatment services for ASAM 2.1.

COMMENT #6: Several commenters stated that staffing requirements described in the BHDD Medicaid manual SUD policies do not conform with the ASAM Criteria. These staffing requirements represent a hardship on providers during the current workforce shortage.

RESPONSE #6: The department will amend the policies to remove required full time equivalent (FTE) staff and will instead provide clarification of available service components. This will give providers staffing flexibility and allow them to provide individualized care based on the needs of the member.

COMMENT #7: A commenter asked several questions pertaining to the specifics of program administration for the PACT program that are outside the scope of this rulemaking.

RESPONSE #7: The department acknowledges receipt of these questions. It has been the experience of the department that providers prefer to have a level of discretion in how they manage the provision of services based upon their clinical expertise; therefore, the department will take these questions under consideration for future rulemaking after consultation with the provider community.

COMMENT #8: A commenter disagreed with changing "psychosocial rehabilitation" to Community Based Psychiatric Rehabilitative Support Services (CBPRS) in the services components for ASAM 2.1 in Policy 525. The commenter stated a belief that CBPRS is a psychiatric service, and as a substance use disorder provider, they do not qualify to provide that service.

RESPONSE #8: As long as the provider is a state approved facility, it is qualified to provide the CBPRS service. State approved facilities have been added under provider requirements in the CBPRS policy. CBPRS is a behavior management and stabilization service provided in the home, workplace, or community settings to

reduce disability and restore functioning, and to help individuals return to natural settings and activities that are part of a socially integrated life. Substance use disorder has been added to the medical necessity criteria in that policy as well.

COMMENT #9: A commenter asked if they still need to do a level of impairment worksheet if the member has a severe and disabling mental illness (SDMI) diagnosis and meets the eligibility requirements.

RESPONSE #9: Based on this comment, the department will remove the requirement for a level of impairment worksheet from Policy 460 for determination of medical necessity. Providers should follow Policy 105 when determining if someone has a severe and disabling mental illness.

COMMENT #10: A commenter suggests adding "utilizing the ASAM criteria" in Policy 115 to read, "trained in performing biopsychosocial assessments utilizing the ASAM Criteria."

RESPONSE #10: The department acknowledges the comment and will take it into consideration for future rulemaking. Policy 115 is intended to encompass all behavioral health assessments, not just those for substance use disorder.

COMMENT #11: A commenter asked who determines if a member meets the medical necessity criteria and who provides the assessment. In addition, the commenter asked what "willing and able" looks like.

RESPONSE #11: A licensed mental health professional as defined in 53-21-102, MCA, can provide the assessment and through that assessment can determine if the member meets the medical necessity criteria of the service. Through the medical necessity criteria and ongoing assessment, providers can determine a client's interest and ability to participate in treatment.

COMMENT #12: A commenter requested the department define child/family support specialist, which is listed as required staff in Policy 535.

RESPONSE #12: The department will amend Policy 535 and remove the required full time equivalent (FTE) staff. Please see the department's response to Comment #6.

COMMENT #13: A commenter recommended adding a timeline for completion of the treatment plan and a requirement that the client be included in completion of the treatment plan under Policy 120.

RESPONSE #13: The department will amend Policy 120 to add that language back as it was proposed as stricken language in the proposed policy.

COMMENT #14: A commenter stated they are unable to find discharge summary information in the manual policies.

RESPONSE #14: The department amended Policy 135 to reflect a continuing care plan instead of a discharge summary to address provider feedback that not all clients are discharged. The need for a summary of treatment services is included as a component of the continuing care plan.

COMMENT #15: A commenter recommended updating the definition of the service in ASAM 3.2-WM in Policy 536 to align with the current ASAM Criteria.

RESPONSE #15: The language used for the definition of the service in this policy was taken from pages 137 and 138 of the ASAM Criteria.

COMMENT #16: A commenter made multiple comments on the proposed Policy 460QM, PACT Quality Measures. Some of the comments were vague and did not reference anything specific in the policy, including: "There are no instructions." "Who do we send this to?" "How often?" "What is it used for?" (without reference to what "it" refers to.) "Is there a form we're supposed to fill out?"

RESPONSE #16: The department created the quality measures outlined in the newly proposed Policy 460QM in collaboration with Montana's PACT providers prior to the COVID-19 public health emergency. Based upon the questions received from the commenter, the department has decided to withdraw this policy at this time and revisit the quality measures with providers in the context of the current environment.

COMMENT #17: A commenter asked about lower and higher levels of care relating to the Program of Assertive Community Treatment (PACT) service.

RESPONSE #17: Assertive community treatment is the highest level of intensity service that can be received in the outpatient setting; therefore, lower levels of care would be any other outpatient services and higher levels of care would include those that are not in an outpatient setting.

COMMENT #18: A commenter asked why it is necessary to complete updates to a member's continuing care plan when PACT is a long-term service.

RESPONSE #18: The department agrees with the commenter, and will amend the language in Policy 460 to add a reference to individualized treatment plan along with continuing care plan.

COMMENT #19: A commenter asked what would happen if they chose not to meet the service requirement that 60% of PACT services must be provided in a member's natural environment.

RESPONSE #19: Based upon the PACT fidelity standards scale, 60% is the minimum amount of time which must be spent in the members natural environment and still achieve a rating score of "4." If a provider chose to not deliver that level of care in a member's natural environment, it will have a negative effect on the

provider's PACT fidelity scoring. In addition, a provider's failure to meet the minimum requirements as outlined in the manual could result in an enforcement action and possible return of Medicaid funding.

COMMENT #20: A commenter asked how the provider is to know what services may or may not be duplicative with services provided in an inpatient or hospital setting.

RESPONSE #20: According to Policy 460, PACT team members should coordinate with the hospital regarding the provision of PACT services while the member is in the hospital setting.

COMMENT #21: A commenter asked if the PACT team is expected to reassess medical necessity criteria to determine if the member continues to meet the criteria while they are in an inpatient setting.

RESPONSE #21: In responding to this comment, the department reviewed the proposed language in Policy 460 and will remove the requirement that the member must continue to meet the medical necessity criteria for PACT while in an inpatient setting.

COMMENT #22: A commenter asked if a member who is on the Community Maintenance Program (CMP) can also receive concurrent services while the member is in an inpatient setting.

RESPONSE #22: The proposed amendments allow for concurrent reimbursement for the PACT tier, not for the CMP tier. The language in Policy 460 has been amended to clarify "core PACT."

COMMENT #23: A commenter submitted several recommendations for multiple policies pertaining to the specifics of program administration for services that are outside the scope of this rulemaking.

RESPONSE #23: The department acknowledges receipt of these questions. It has been the experience of the department that providers and partner agencies have invaluable knowledge and experience regarding the delivery of services; therefore, the department will take these recommendations under consideration for future rulemaking after consultation with the commenter and the larger provider community.

COMMENT #24: A commenter asked if a provider cannot achieve the minimum contacts and the client must be reassessed, does this requirement apply to CMP. In addition, the commenter asked for clarification if the two weeks were per month, per year, or consecutively.

RESPONSE #24: The requirement to assess a member for the appropriate level of care when the PACT team cannot make the required contacts applies to both the

core PACT service and to CMP. The two-week timeframe refers to two consecutive weeks.

COMMENT #25: A commenter asked what assessment the PACT teams are supposed to use to determine "appropriateness for level of care."

RESPONSE #25: Under Policy 460, providers are expected to apply their clinical expertise when determining if a member is appropriate for the PACT level of care.

COMMENT #26: A commenter asked if they could bill for PACT services if a member is incarcerated.

RESPONSE #26: Medicaid cannot pay for services provided to a member who is incarcerated.

COMMENT #27: A commenter asked a few questions about Policy 530 relating to utilization management.

RESPONSE #27: The department acknowledges receipt of these questions and notes that Policy 530 was not proposed for change, and thus, the comments are outside the scope of the rulemaking. The department will follow up with the commenter with some technical assistance around utilization management.

COMMENT #28: A commenter recommended changing the requirement for quarterly review of the quality improvement plan to annually.

RESPONSE #28: The department disagrees with the commenter. The quality improvement plan must be completed annually and reviewed quarterly. This allows the administrator and the governing body or oversight committee to assess and ensure progress under the plan and make any appropriate changes to the plan.

COMMENT #29: A commenter requested clarification if skilled treatment services need to be provided on-site or can they be provided at an outpatient treatment center that runs the facility.

RESPONSE #29: The department has amended the rule to allow services to be provided on-site or off-site for ASAM 3.1 services as indicated in the ASAM Criteria. This allows outpatient treatment programs to provide skilled treatment services off-site.

COMMENT #30: A commenter requested clarification regarding outcomes measures in ARM 37.106.1462.

RESPONSE #30: The department cannot provide clarification as the referenced rule has been repealed under this rulemaking.

COMMENT #31: A commenter suggested that ARM 37.106.1470 does not require one operational outside window in each bedroom.

RESPONSE #31: The proposed rule does not have this requirement as this language was removed following public meetings prior to publication of this MAR rulemaking notice.

COMMENT #32: A commenter requested "mental health component" be defined because a mental health assessment is not required by a nurse as required in ARM 37.106.1475. The commenter states if "component" means risk screening, the commenter has no concerns.

RESPONSE #32: The department agrees a nurse is not required to complete a mental health assessment. The proposed rule does not have this requirement as this language was removed following public meetings prior to the publication of this MAR rulemaking notice. The rule was revised to require a mental health screening pursuant to the ASAM Criteria.

COMMENT #33: A commenter requested safety rails on beds be available for use, not required on all beds.

RESPONSE #33: The department agrees with the commenter. ARM 37.106.1480 as written does not require safety rails on all beds. It states the facility beds must be equipped with safety rails for patients who may require them.

COMMENT #34: A commenter requested clarification on what evidence-based program is required for Life Skills.

RESPONSE #34: The proposed rule does not specify a specific model and allows providers the flexibility to select the evidence-based program that works best for their organizations.

COMMENT #35: A commenter requested clarification regarding if the clinicians will need to do an ASAM six-dimensional analysis for every patient every week for the treatment plan review.

RESPONSE #35: A biopsychosocial assessment includes all six dimensions of the ASAM model and is to be completed prior to, or at the time of, admission. Progress in each of the six dimensions needs to be reviewed during the treatment team review. A new biopsychosocial assessment does not need to be completed again every week.

COMMENT #36: A commenter requested clarification on the use of "mental health professional" as that terminology can only be used by other licensed mental health providers as it is defined in ARM Title 37, chapter 91. The commenter states there are very few licensed mental health providers in Montana that have gone through this specific training and certification to be designated a "mental health professional."

RESPONSE #36: "Mental health professional" as defined in ARM 37.104.1413 does not reference requirements in ARM Title 37, chapter 91. Thus, the requirements of ARM Title 37, chapter 91 do not apply to this chapter and are outside the scope of this rulemaking.

COMMENT #37: A commenter suggested certification training for CPR, first aid, and physical restraint training required for adolescent programs be complete within 30 days of hire for patient safety and an efficient use of staff resources. The commenter stated providers should prioritize certification training to ensure competency and transition to allow independent direct services in a timely manner.

RESPONSE #37: The department agrees training should be prioritized; however, it disagrees with requiring providers to complete training within 30 days. These are specialized training requirements that providers may not be able to access every 30 days. When providers do not have certified trainers on staff, they may need additional time to schedule this training with outside organizations. This rule does not prohibit providers from completing training within 30 days when available to allow staff to work independently sooner. The rule requires untrained staff to always work with individual staff members who have received the required training in order to ensure one staff member on shift is fully trained for safety reasons.

COMMENT #38: A commenter requested clarification on whether the SUDF must provide either 20 hours of annual training or the time for employees to complete 20 hours of annual training. The commenter believed this would benefit the organization to allow training to be completed by another agency.

RESPONSE #38: The rule allows training that is completed by outside organizations to be counted in the 20 hours of annual training.

COMMENT #39: A commenter strongly supported requirements that prohibit SUDFs from discontinuing medications prescribed by a licensed health care professional, as described in NEW RULE XI.

RESPONSE #39: The department acknowledges and appreciates the comment.

COMMENT #40: A commenter strongly recommended NEW RULE XIV require direct access by consultation or referral to medical and psychiatric services as required in New Rule XVII or align with current ASAM requirements for Level 3.5 to include telephone or in-person consultation with health care professional 24 hours a day, seven days a week.

RESPONSE #40: The department agrees, and will amend the rule to include physicians and physician extenders as required for ASAM 3.5 services in the ASAM Criteria.

COMMENT #41: A commenter recommended the clinical director have at least three years of experience in a similar setting with supervisory responsibilities to ensure competency and to support quality and patient safety.

RESPONSE #41: The department disagrees with the commenter as requiring three years of experience puts an additional burden on providers when there are limited mental health professionals available to fill this role. The department prohibits licensure candidates from filling this role to ensure the clinical director has completed all the education and clinical requirements for the position.

COMMENT #42: A commenter informed the department that "participant names" in ARM 37.106.1413(28) should not be plural.

RESPONSE #42: The department agrees, and has amended the rule accordingly.

COMMENT #43: A commenter suggested language in ARM 37.106.1435(1)(b) be written the same as (1)(c).

RESPONSE #43: The department agrees that ARM 37.106.1435(1)(b) should address trainees, interns, and volunteers, and has amended the rule accordingly. Because of the context, the department does not think that the provision can be written identically to (1)(c).

COMMENT #44: A commenter recommended citing reporting law instead of requiring SUDFs report allegation of abuse, neglect, and exploitation within 24 hours. The commenter stated imminent danger is an immediate report to law enforcement.

RESPONSE #44: The department disagrees with the commenter as Montana reporting laws for abuse, neglect, or exploitation do not require reports within a certain timeframe. Moreover, the reporting laws referenced in the rule do not reference imminent danger or require an immediate report to law enforcement. The regulatory requirement provides a reasonable timeframe for facilities to report abuse, neglect, or exploitation to the appropriate authorities.

COMMENT #45: A commenter submitted concerns regarding the requirement for an SUDF to fully cooperate with an investigation that results from an abuse, neglect, or exploitation report. The commenter stated they have worked APS/CPS cases where the department or case worker demands hours and hours of staff time. The commenter would like to know who will reimburse for that.

RESPONSE #45: It is necessary to require an SUDF to fully cooperate with any investigation into concerns of abuse and neglect or exploitation. This will help to ensure investigators have access to all the information required to complete a thorough investigation. Such cooperation in investigations of potential violations by the provider is generally a cost of doing business, but in extraordinary circumstances, or when the investigation does not concern compliance by the

providers or their workforce, providers should discuss any potential reimbursement with the agency or department with whom they are working.

COMMENT #46: A commenter would like to know how the facility can legally pull an employee from work on a suspicion of abuse or neglect when guilt has not been established by a court of law. Do SUDFs have a new special legal status where we can establish guilt before innocence?

RESPONSE #46: Allegations of abuse or neglect must be taken seriously, and facilities must err on the side of caution when handling such allegations. Ensuring staff accused of abuse or neglect not provide direct care during the pendency of an investigation not only protects the alleged victim, but the staff accused as well. This allows an investigation into the allegation to occur without any potential interference.

COMMENT #47: A commenter stated the language "must not work" without the training, as described in NEW RULE IX, needs clarification.

RESPONSE #47: The department disagrees that the rule needs clarification. The rules state staff that have not received the certification "must not work unsupervised with clients."

COMMENT #48: A commenter stated that requiring 20 hours of training will inhibit the clinics' ability to have certain residents/students do rotations through their clinics.

RESPONSE #48: The commenter is referencing the requirement for annual training. Students and interns are not required to complete annual training unless they continue to work at a facility for over a year.

COMMENT #49: A commenter asked if someone 18, 19, or 20 is considered an adolescent.

RESPONSE #49: A person 18, 19, or 20 can be defined as an adolescent if the individual meets the requirements outlined in the definition section of this rule for "adolescent."

COMMENT #50: A commenter stated the language around legal adult and youth is ambiguous and could create legal issues for providers. The commenter wondered how this definition will interact with existing state law.

RESPONSE #50: The department disagrees with the comment. The rule clearly defines "adult" and "adolescent" and provides clear guidelines on when an individual over the age of 17 can be treated in an adolescent facility. This rule will not interfere or interact with existing state law regarding the definition of "adult."

COMMENT #51: A commenter stated requiring one awake night staff person in each unit of a facility that serves adolescents goes against trauma informed best practice. The commenter believes more programs are trying to become more

trauma informed and allow older youth more space and suggested allowing four youth to a bunkhouse. The commenter stated that this requirement, as written, will cause programs to go bankrupt and having a staff sit in a bedroom at night is "creepy."

RESPONSE #51: The department disagrees with the commenter. The requirement for awake night staff provides the appropriate level of supervision for adolescents to ensure the safety and security of residents.

COMMENT #52: A commenter recommended "licensed" be included before mental health professional.

RESPONSE #52: The department disagrees with adding licensed in front of mental health professional as the term is defined in ARM 37.106.1413.

COMMENT #53: A commenter stated requiring staff to be at least 21 years of age or older is age discrimination. The commenter advised the department to consider striking this requirement as employers are already very aware of the risks of young staff members.

RESPONSE #53: The department disagrees with the commenter as the age requirement is reasonable, given the age of residents/clients in adolescent programs may be the same age as staff members responsible for caring for them.

COMMENT #54: A commenter asked if all SUDFs are required to have a policy for standards related to food or can it be limited to facilities that provide food.

RESPONSE #54: The rule regarding food standards policy requires only inpatient and residential programs, all of which provide food, complete policies.

COMMENT #55: A commenter suggested that the word "targeted" should be removed from "targeted care manager."

RESPONSE #55: The department agrees, and has amended the rule accordingly.

COMMENT #56: A commenter expressed concerns regarding who within the SUDF under NEW RULE XV can determine both developmental states and comprehension of clients to modify interventions and how are significant cognitive deficits defined.

RESPONSE #56: The department agrees, and will amend the rule to include physicians and physician extenders as required for ASAM 3.3 services in the ASAM Criteria.

COMMENT #57: A commenter stated NEW RULE XVIII does not mention ASAM 2.1 or lower and wonders if that is implicit to outpatient or does it need to be included.

RESPONSE #57: Outpatient substance use disorder facilities can provide ASAM 2.1 level of care, as an outpatient setting would encompass both ASAM 1.0 and ASAM 2.1 levels of care.

COMMENT #58: A commenter requested clarification on what care managers do, how they document, and how they are represented in a treatment plan.

RESPONSE #58: Care managers are defined in ARM 37.106.1413, and programs must develop written policies and procedures for the care management program as described in NEW RULE XX. Care managers should be part of the interdisciplinary treatment team and participate in the development and review of treatment plans.

COMMENT #59: A commenter submitted concern that allowing rehabilitation aides to lead education groups negates clinical directions and would impact anger management under law or parenting courses that are evidence based.

RESPONSE #59: The department disagrees with the commenter, as all facilities are required to have a clinical director to supervise the provision of skilled treatment services which include educational groups. The rule does not prohibit any facility from requiring the licensed addiction counselor or mental health professional from providing/leading these groups if the facility chooses to do so.

COMMENT #60: A commenter stated that ASAM allows for attendance in an AA group to count as a clinical intervention counting towards 9+ hours for level ASAM 2.1 intensive outpatient services if it has been clinically indicated by the rendering provider and documented in a treatment plan.

RESPONSE #60: The department disagrees. The ASAM Criteria indicates that "attendance" at self-help/mutual help meetings such as Alcoholics Anonymous or Narcotics Anonymous, volunteer activities, or homework assignments involving watching videos, journaling, and workbooks do not represent "skilled treatment services" for the purpose of meeting the required clinical hours for each level of care.

COMMENT #61: A commenter asked if the department would define group size for inpatient.

RESPONSE #61: The department will not define group size for inpatient treatment purposes. The department recognizes that all facilities are different and may serve different populations with different needs. Accordingly, the rule requires facilities to have policies and procedures defining client/staff member ratios for group counseling sessions.

COMMENT #62: A commenter asked how the department defines "significant other."

RESPONSE #62: The department does not define "significant other." The client/patient should determine what individual would be considered a "significant other."

COMMENT #63: A commenter stated that the rule requiring volunteers not be part of staff ratio contradicts "earlier" sections that said volunteers must be referred to as staff.

RESPONSE #63: The department disagrees with the commenter as the rule states volunteers must not be counted as part of the client/staff ratio. While the department is unable to determine what "earlier" section(s) the commenter is referencing, the rule is not inconsistent with requiring that volunteers meet certain requirements that are applicable to staff (or, for purposes of such requirements, including volunteers in the category of "staff").

COMMENT #64: A commenter submitted concerns that private practices and smaller SUDFs cannot comply with the requirement to have an interdisciplinary team. The requirement creates an undue hardship and should read that we capture holistic wraparound in treatment planning.

RESPONSE #64: The department disagrees with the commenter. All treatment plans must be developed by an interdisciplinary team. All licensed SUDFs subject to this rule employ or contract with staff from many disciplines who can be included as part of the interdisciplinary team as required by ASAM Criteria. Private practice clinicians are not required to be licensed as an SUDF and can provide services as an independent clinician.

COMMENT #65: A commenter submitted a 15-page document. Several comments were based on an early draft of the rules and do not correlate to the new rule numbers in the final version of the proposed rule filed with the Secretary of State's office.

RESPONSE #65: The department made efforts to identify any substantive comments in the submission that continue to be relevant to the proposed rulemaking published on August 5, 2022 (and to the final version found in this MAR notice) and to address such comments.

COMMENT #66: A commenter asked what liabilities exist when having a legal adult patient 20 years of age with a 15-year-old.

RESPONSE #66: SUDF facilities choosing to serve individuals over the age of 17, as defined in this rule, should consult their own legal adviser on such issues and determine if they are able to appropriately treat and supervise all patients. The rule does not require adolescent facilities to admit individuals over the age of 17.

COMMENT #67: A commenter requested the definition of "Recovery Residence" in ARM 37.106.1413 include a statement that "Recovery Residences are certified by

the Recovery Residences Alliance of Montana and do not require licensure." Adding the language would benefit the state by placing responsibility for technical assistance onto this new governing body.

RESPONSE #67: The department disagrees with adding language to the "Recovery Residence" definition. The department does not have the authority to impose requirements on other entities or facilities not required to be licensed by the department.

COMMENT #68: A commenter requested clarification on what "training in adolescent development" means in NEW RULE IX.

RESPONSE #68: Training in adolescent development should be tailored to address the physical, intellectual, behavioral, social, and emotional development of adolescents between childhood and adulthood.

COMMENT #69: A commenter requested clarification if NEW RULE X applies to 3.1 women and children's facilities.

RESPONSE #69: The rule would apply to 3.1 level of care if licensed to serve adolescents as defined in this rule. The rule would not apply to licensed adult 3.1 homes where children under the age of 18 are only present because they are living with a parent who is receiving treatment at the facility.

COMMENT #70: A commenter asked if the requirement to have staff members of the same sex as the client applies to children in a 3.1 women and children home.

RESPONSE #70: The rule would not apply to require a licensed adult 3.1 home to have staff members of a particular sex based on the sex of a child under the age of 18 who is only present because the child is living with a parent who is receiving treatment at the facility.

COMMENT #71: A commenter requested clarification if it is okay for clients to assist in food preparation as described in NEW RULE XIII.

RESPONSE #71: Yes, clients may assist in food preparation as part of the facility programming.

COMMENT #72: A commenter asked if a 3.1 adolescent facility can also be a 3.1 women and children home as described in NEW RULE XVI.

RESPONSE #72: A facility could be licensed as an adolescent single parent women and children home if they only admit adolescents up to the age of 18 or 21 under circumstances as defined in NEW RULE XVI.

COMMENT #73: A commenter requested clarification on what "sufficient number" means, and how it will be determined and measured.

RESPONSE #73: The rules provide clear guidelines for "sufficient number" under each staffing requirement. When facilities are not meeting these requirements, the department may make the determination they do not have enough staff filling that role.

COMMENT #74: A commenter asked if medical marijuana would be included in NEW RULE XI, which prohibits prescribed medications from being discontinued.

RESPONSE #74: Medical marijuana is prohibited in health care facilities pursuant to 50-5-101, MCA. Procedures to follow for health care facilities admitting patients that have medical marijuana are outlined in 16-12-514, MCA.

COMMENT #75: A commenter stated that ASAM does not identify the number of hours per day that a program must conduct "skilled treatment services." The commenter recommended state guidelines follow ASAM.

RESPONSE #75: The department partially agrees, and has amended the rule accordingly. ASAM 2.5 requires a minimum of 20 hours of skilled treatment services per week; therefore, the department has added language that requires ASAM 3.5 level of care to provide 30 or more hours per week. This requirement is reasonable for a residential facility that is required to have a 24-hour, seven days per week treatment environment. The hourly requirement per week provides a measurable way to determine compliance.

COMMENT #76: Several commenters stated that definitions differed across the rules and manual policies. The commenters recommended the department revise rules and policies to ensure that definitions are consistent between licensure, state approval, and Medicaid rules.

RESPONSE #76: The department agrees and has amended the rules and manual policies accordingly to the extent possible.

COMMENT #77: A commenter noted that the definition of "licensed addiction counselor" (LAC) specifies that it does not include LAC candidates. The commenter expressed concern this would affect providers' ability to staff their programs.

RESPONSE #77: The department will amend the rule to clarify that the definition of LAC in ARM 37.27.102 is referencing individual LACs who are state approved under ARM 37.27.107. State approval under ARM 37.27.107 is intended for LACs that are fully licensed and able to practice independently without the need for supervision.

COMMENT #78: A commenter asked for clarification of the term "state approved program" now that individuals and clinics are also approved.

RESPONSE #78: Individual LACs have been able to become state approved under ARM 37.27.107, which was effective 2/13/2021. These rules further delineate that

state approved programs include licensed SUD facilities, individual LAC providers, and prevention providers.

COMMENT #79: A commenter requested clarification on "programs participate in quarterly updates with the department" as described in ARM 37.27.120.

RESPONSE #79: The department will amend the rule to clarify that state approved "providers will submit quarterly updates to the department" to ensure that the department has current information for each provider and the services they offer.

COMMENT #80: A commenter asked if daily scheduled services are required five or seven days per week. If required seven days per week, the commenter requested an amended schedule be allowed for Sundays and holidays in order for clients to possibly attend religious services, observe holidays, and give staff the ability to have a holiday or a Sunday off.

RESPONSE #80: Daily scheduled services are required seven days per week including Sundays and holidays. The department removed the hourly requirement for daily clinical services and replaced it with a weekly requirement in order for the facility to have the ability to provide an amended schedule to incorporate religious services and holiday celebrations.

COMMENT #81: A commenter stated that 24/7 staffing in NEW RULE XVI for ASAM 3.1 homes will be extremely difficult, if not impossible to maintain. The commenter stated residents are typically outside of the home 8 to 10 hours per day, and during the weekdays a house parent/staff will be home alone 90% of the shift.

RESPONSE #81: The department agrees, and will amend the rule to require awake staff on-site when clients are present in the facility as required for ASAM 3.1 level of services in the ASAM Criteria.

COMMENT #82: A commenter stated the department needs to clarify why ASAM 3.1 homes need to provide five hours of treatment in the actual home as required in NEW RULE XVI. The commenter stated the requirement puts an unfair burden on residents who are attending IOP treatment at local outpatient clients or attending other levels of treatment in the community.

RESPONSE #82: The department will amend the rule to be consistent with ASAM Criteria, which requires a clinical services component that includes five hours of treatment per week provided on-site or off-site, and a recovery residence component that includes recovery support services that promote interpersonal and group living skills.

COMMENT #83: A commenter asked if the ARM referenced in NEW RULE XIV follows CDC guidelines for tuberculosis (TB) screening.

RESPONSE #83: The ARM referenced in NEW RULE XIV incorporates CDC guidelines. The department has amended the rule to ensure that the TB screening requirements are clear.

COMMENT #84: A commenter recommended a care manager required in NEW RULE XX be allowed to have three years of documented equivalent experience as an alternative option.

RESPONSE #84: The department partially agrees with commenter as the rule already allows for care managers to have two years of experience. The rule states education and experience, or a minimum of two years of experience serving individuals with behavioral issues. The department disagrees with the commenter's recommendation of three years of experience because the department believes that two years of experience is sufficient. The department amends the rule to indicate that the experience be documented in the personnel record. The department also amends the rule to indicate that the combination of education and experience should be an equivalent combination of education and experience.

COMMENT #85: A commenter suggested changing the rule title of ARM 37.106.1401.

RESPONSE #85: The department disagrees, as this rule has been repealed under this rulemaking.

COMMENT #86: A commenter stated NEW RULE XX will place the non-clinician care manager at odds with decisions of the therapist and clinical director and serve to divide the care team.

RESPONSE #86: The department partially agrees with comment. However, it is the responsibility of the care manager to advocate for the client in instances when additional services or services provided by another agency may further benefit the client. A facility's policies and procedures should address when this situation arises and ability for the care manager to contact an advocacy organization on behalf of the client, as appropriate or as needed.

COMMENT #87: A commenter stated language around care plans and treatment plans are confusing and asks for clarification.

RESPONSE #87: The department is unable to adequately respond as the commenter does not specify what they find confusing. However, the department will amend rules to ensure that definitions are consistent throughout these rules.

COMMENT #88: Multiple commenters requested the department define "face-to-face" in the rules.

RESPONSE #88: The department disagrees with this comment as the term "face-to-face" is not used in these proposed (or final) rules. This language was revised

following public meetings prior to publication of the MAR notice for the proposed rules.

COMMENT #89: A commenter requested clarification on how ARM 37.106.1425 would apply to for-profit organizations without a governing body that are individually owned.

RESPONSE #89: The department will provide clarification and amend the rule to add an oversight committee as an option for such individually owned for-profit organizations.

COMMENT #90: A commenter recommended changing the requirement for routine reviews of policies and procedures to annual reviews.

RESPONSE #90: The department disagrees as the proposed rule does not require policy and procedures to be reviewed "routinely." The department notes, however, that all health care facilities must review their policies and procedures annually, pursuant to ARM 37.106.330.

COMMENT #91: A commenter had a concern that job qualifications that include a requirement that staff must be free of substance use problems for at least two years as part of the hiring process is impossible to enforce.

RESPONSE #91: The proposed rule, ARM 37.106.1430, does not have this requirement as this language was removed following public meetings prior to publication of the MAR notice for the proposed rules.

COMMENT #92: A commenter asked if ASAM 3.2-WM can be a free-standing facility or does it need to be a part of an existing ASAM 3.5 or 3.7 facility.

RESPONSE #92: ARM 37.106.1480 lists ASAM 3.2-WM treatment services as being provided in a licensed inpatient or residential facility licensed under Title 50, chapter 5, MCA. These services cannot be provided in a free-standing facility.

COMMENT #93: A commenter indicated that the definition of "skilled treatment services" is word for word the same as ASAM's definition, except for the addition of one service: Psychosocial Rehabilitation. Skilled treatment services, as defined by ASAM, are services such as: individual and group counseling, medication management, family therapy, educational groups, occupational and recreational therapy, and other therapies. The commenter expressed concern that Montana Medicaid altered a standard definition published by the ASAM without research or evidence.

RESPONSE #93: The department agrees with the commenter and has amended the definition of "skilled treatment services" to exclude psychosocial rehabilitation to align with the ASAM Criteria. The department consulted with ASAM and was provided guidance to clarify that skilled treatment services must be provided by

clinical staff licensed pursuant to Title 37, MCA. In accordance with the guidance, the department has made corresponding changes to New Rule XIV(2), New Rule XV(2), New Rule XVI(2), ARM 37.106.1413(15) and (35), ARM 37.106.1475(3), and ARM 37.106.1480(1)(i).

/s/ FLINT MURFITT
Flint Murfitt
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.85.104 and 37.85.105 pertaining to updating Medicaid and non-Medicaid provider rates, fee schedules, and effective dates	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-1012 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1615 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has amended the above-stated rules as proposed.

3. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: A commenter asked why the rates had decreased for crisis stabilization.

RESPONSE #1: The rates have not decreased for crisis stabilization. The department is aligning non-Medicaid state-funded crisis services with Medicaid-funded crisis services. To align such crisis stabilization services with Medicaid-funded crisis stabilization services, the department has proposed a per diem rate for non-Medicaid crisis stabilization services of $367.54, which is consistent with the rate for Medicaid-funded crisis stabilization services. This is not a rate reduction as this rate averages out, over a three-day period, to be higher than the average reimbursement for a three-day stay under the current 72-hour program and also allows for additional days if the individual requires a longer stay.

COMMENT #2: A few commenters stated that the proposed hourly rate of $21.16 for non-Medicaid crisis receiving is not sufficient for financial stability of the program and provides the wrong incentive for providers to keep individuals for as long as possible to receive a higher reimbursement, compounding the individual's trauma. In addition, one of the commenters proposed a couple of alternative rate structures for the department to consider. One proposed method would be to front-load the reimbursement to reflect the acuity of an individual's first hours of stay, the other is to establish a daily rate of $390.00 per day regardless of the number of hours an individual is in a crisis receiving center. One of the commenters also stated that the department proposed substantive changes to the crisis reimbursement rates for non-Medicaid populations, but the fee schedules are not in alignment.

RESPONSE #2: The department agrees with the commenter that non-Medicaid and Medicaid crisis stabilization services fee schedules need to be aligned, and will adjust the fee schedules accordingly. The department also agrees with the commenter that there is potential for providers to keep individuals longer than necessary in order to maximize reimbursement. To address this potential issue, the department will set the daily rate for both of the non-Medicaid and Medicaid crisis receiving services consistent with the rate that is established for Medicaid funded crisis receiving and stabilization, which is $367.54, regardless of how long the individual is in crisis receiving, up to 23 hours and 59 minutes. This addresses both commenters' concerns about the sustainability of the program and the consistency of rates. The department is working with a contractor to review provider reimbursement rates across the department's programs and services. As a result, and consistent with current appropriations, the department cannot consider an increase to $390.00 per day at this time.

COMMENT #3: One commenter stated that, because the department did not align crisis service rates with those proposed by the rate study, it ensures that no providers can establish or maintain crisis services.

RESPONSE #3: The department acknowledges that the rates were not adjusted to the rates identified by the provider rate review. The department continues to work with the contractor completing the provider rate review with respect to all the proposed rates and is aware that there are discrepancies. The provider rate review has resulted in a report to be utilized by the legislature in the upcoming legislative session. However, at this time, the department does not have the appropriations to increase the crisis service rates consistent with the rates identified by the contractor in the provider rate review

COMMENT #4: Several commenters recommended the department remove mental health as a required component in the substance use disorder (SUD) proposed bundled rates. The commenters noted that not all members need to receive mental health services and allowing mental health to be billed outside the bundled rate allows for more individualized care.

RESPONSE #4: The department agrees with commenters and will amend the SUD bundled rates on the fee schedules to reflect the removal of mental health service from the bundle of services. The amended rates will be provided by the contractor that performed the provider rate review for the department. This will allow providers to bill mental health outside the bundled rate on a fee-for-service basis.

COMMENT #5: A few commenters stated that moving from the tiered reimbursement rates to a weekly bundled rate for ASAM 2.1 will be detrimental to the delivery of this service and providers will lose revenue.

RESPONSE #5: The department acknowledges that a weekly bundled rate is different from how providers currently bill for ASAM 2.1 services. Currently,

providers are allowed to bill for services for a given day in a week as high tier (six hours per week for adults; four hours per week for adolescents) or low tier (4-5 hours per week for adults). The department's goal is to align reimbursement with the ASAM Criteria. ASAM 2.1 programs provide a minimum of nine hours of skilled treatment services per week for adults and six hours of skilled treatment services per week for adolescents. The weekly rate for such bundled services will be billable provided that the client receives the applicable minimum number of hours of treatment services. This approach allows the department's rates to be aligned with the ASAM Criteria. The proposed rate was developed by the contractor that performed the provider rate review for the department.

COMMENT #6: A few commenters expressed concerns about discontinuing room and board reimbursement for ASAM 3.1 in lieu of bundled rates for ASAM 3.1 facilities. Providers have been allowed to bill room and board as a non-Medicaid service concurrently with Medicaid-covered treatment services. One commenter suggested that funds be made available to help fund room and board in addition to the proposed bundled rate.

RESPONSE #6: Medicaid does not pay for room and board. Accordingly, because the department is adding ASAM 3.1 to the Medicaid state plan and aligns non-Medicaid state-funded SUD services with Medicaid-funded SUD services, the department will no longer be providing non-Medicaid reimbursement for room and board. However, other program costs were included in the methodology used to develop the rates. The proposed bundled rates for substance use disorder levels of care were developed by the contractor that performed the provider rate review for the department. The contractor reviewed the ASAM Criteria and considered several factors in the development of the rates including staff wages provided through provider surveys, staff time needed to deliver the service, clinical supervision, productivity adjustment, administrative costs, program support costs, and staff benefits/compensation.

COMMENT #7: One commenter recommended the department consider unbundling rates for substance use disorder services. The proposed changes ignore ASAM guidance of an unbundled service delivery model. The commenter states that unbundling would allow for a flexible continuum of care. The commenter suggests that several services should be billable concurrently pursuant to a "fee for service" model. They list mental health therapy, targeted case management (TCM), community based psychiatric rehabilitative support services (CBPRS), and illness management and recovery (IMR).

RESPONSE #7: The proposed bundled rates for substance use disorder levels of care were developed by the contractor that performed the provider rate review for the department. Implementing these bundled rates will ensure a consistent rate methodology for all levels of care. The contractor reviewed the ASAM Criteria and considered several factors in the development of the rates including staff wages provided through provider surveys, staff time needed to deliver the service, clinical supervision, productivity adjustment, administrative costs, program support costs,

and staff benefits/compensation. Additionally, the department has agreed to remove mental health services from the bundle of substance use disorder treatment services and to permit it to be billed outside the bundled rates. Bundling services commonly provided as part of a course of treatment for payment purposes is an efficient mechanism for billing (and payment) of such services. The department is required to prevent duplicate billing and Medicaid does not allow concurrent reimbursement of services that share any service components. Consequently, the commenter's suggestion would require the department to develop several different bundled payment rates for substance use disorder care (to reflect which services are not included in the bundle and which would be billed separately). Such an approach would create an unacceptable level of complexity and confusion and increase the potential for improper claims.

COMMENT #8: A few commenters expressed concerns regarding the proposed bundled rates stating that those rates will not cover the additional staffing requirements for the particular level of care.

RESPONSE #8: The bundled rates are designed to ensure a consistent rate methodology for all levels of care. The proposed bundled rates for substance use disorder levels of care were developed by the contractor that performed the provider rate review for the department; its methodology for development of the rates was designed to capture the components of care that contribute to the costs of providing such care. The contractor reviewed the ASAM Criteria and considered several factors in the development of the rates including staff wages provided through provider surveys, staff time needed to deliver the service, clinical supervision, productivity adjustment, administrative costs, program support costs, and staff benefits/compensation.

COMMENT #9: One commenter recommended the department increase the proposed bundled rate for ASAM 3.1 parent/child facilities from the proposed rate of $210.13 to $330 per day. The commenter states that the increased rate would be needed to account for all costs of the service.

RESPONSE #9: The proposed bundled rates for ASAM 3.1 were developed by the contractor that performed the provider rate review for the department. The contractor reviewed the ASAM Criteria and considered several factors in the development of the rates including staff wages, administrative costs, and program support costs gathered through provider surveys; staff time needed to deliver the service, clinical supervision, productivity adjustment, and staff benefits/compensation. The methodology for development of the rates was designed to capture the components of care that contribute to the costs of providing this level of care.

COMMENT #10: One commenter asked that the department work with the provider to determine which services being provided to children of clients being treated in those ASAM 3.1 facilities can be billed through procedure codes outside the bundled rate.

RESPONSE #10: The bundled rate for ASAM 3.1 is based on provision of services to the client admitted to that level of care, which would be the parent. Medically necessary services provided to the children in accordance with the child's individualized treatment plan would not be included in the bundled rate.

COMMENT #11: One commenter indicated that the proposed reimbursement rate for ASAM 3.1 is not sufficient to cover room and board for that service. They stated that a couple of options have been discussed internally, such as charging rent to ASAM 3.1 clients and the use of TANF funds, but they do not want to require either from clients receiving treatment in the facility. The commenter suggested the department re-implement the Second Chance Home TANF set aside to help cover room and board costs.

RESPONSE #11: The department acknowledges the comment. However, TANF and Second Chance Homes are outside the scope of this rulemaking.

/s/ BRENDA K. ELIAS
Brenda K. Elias
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I and II and the amendment of ARM 38.5.1901, 38.5.1902, 38.5.1903, 38.5.1904, 38.5.1905, 38.5.1907, 38.5.1908, 38.5.1909, and 38.5.1910 pertaining to Public Utility Regulatory Policies Act (PURPA)	))))))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Department of Public Service Regulation published MAR Notice No. 38-5-254 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 1621 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has adopted New Rule I (38.5.1911) as proposed.

3. The department has amended ARM 38.5.1902, 38.5.1903, 38.5.1904, 38.5.1905, 38.5.1907, 38.5.1908, 38.5.1909, and 38.5.1910 as proposed.

4. The department has amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE II (38.5.1912) VOLUNTARY MEDIATION (1) remains as proposed.

(2) Upon receipt of a request for voluntary mediation, the Commission's presiding officer may appoint a mediator. The appointed mediator may not be a member of Commission staff.

(3) remains as proposed.

(4) Unless the parties and appointed mediator otherwise agree, the voluntary mediation will proceed as follows:

(a) Within seven days of the ~~filing of a request for voluntary mediation~~ appointment of the mediator, each party must submit to the mediator an opening mediation statement, including a complete copy of each party's proposed power purchase agreement and a list identifying each disputed contract term.

(b) through (5) remain as proposed.

38.5.1901 DEFINITIONS (1) For purposes of these rules, the following definitions apply:

(a) through (e) remain as proposed.

(f) "Production profile" means the expected hourly generation output of a qualifying facility for a full year based on an engineering analysis of the qualifying facility's power production capabilities and fuel use or availability.

(g) through (2) remain the same.

5. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT 1: One commenter believes the reference in NEW RULE I (38.5.1911) to "effective August 5, 2022" may cause confusion, as December 31, 2020 was the effective date of Federal Energy Regulatory Commission (FERC) Order 872, 85 Fed. Reg. 54733 (Sept. 2, 2020).

RESPONSE 1: The Commission appreciates the commenter's perspective; however, the Commission believes including a specific date in the rule will make it easier to identify which FERC rules have been incorporated in the Commission's rules. All effective rules as of August 5, 2022, including Order 872, are incorporated in this rulemaking.

COMMENT 2: One commenter suggested NEW RULE II (38.5.1912) should be amended to provide that current Commission employees cannot be mediators, to ensure that information discovered in mediation will not be available to the Commission.

RESPONSE 2: The Commission agrees with this suggestion and has revised the rule accordingly.

COMMENT 3: One commenter suggested that the timing for filing opening statements in NEW RULE II (38.5.1912) should be seven days from the appointment of the mediator rather than from the request for mediation, to give the Commission time to appoint a mediator.

RESPONSE 3: The Commission agrees with this suggestion and has revised the rule accordingly.

COMMENT 4: One commenter said the new language in ARM 38.5.1903(1)(c) should not refer to an as-available sales requirement. The commenter noted the language does not come from FERC regulation, but rather mirrors language found in *Pioneer Wind*, which has never been enforced by a court. The commenter asserted that federal regulation allows for uncompensated curtailment if the purchase of qualifying facility (QF) energy or capacity due to operational circumstance would result in greater cost than if the utility had instead generated the power itself, and that the language in the proposed rule would limit the application of this regulation to QFs providing capacity or energy on an as-available basis, excluding QFs with established legally enforceable obligations (LEOs).

RESPONSE 4: The Commission agrees with the commenter that the additional limits imposed on the application of FERC regulation 18 CFR 292.304(f) appear only in FERC precedent, rather than rule. Regardless, the Commission declines to adopt

the commenter's proposed revision because the rule as proposed accurately reflects FERC's current interpretation of the rule.

COMMENT 5: One commenter said language in ARM 38.5.1903(8)(e) was repetitive and unnecessary because (8)(b) requires the utility to provide a copy of a standard rate tariff power purchase agreement to the QF.

RESPONSE 5: While ARM 38.5.1903(8)(b) applies to QFs that appear to be eligible for the standard rate tariff, (8)(e) applies to QFs for which a standard rate tariff is not provided under (8)(b). If in the future the Commission approved a standard form power purchase agreement (PPA) for large QFs, the Commission anticipates that the utility would provide the same to QFs, as applicable. The Commission therefore declines to strike (8)(e).

COMMENT 6: One commenter fully supported proposed changes to ARM 38.5.1905(2) and particularly the time-of-delivery pricing for both as-available purchases and purchases subject to an established LEO. The commenter noted that FERC decided to allow states the flexibility to adopt time-of-delivery energy purchase rates after consideration of the potential detriment of long-term fixed energy purchase rates to utility customers, the impact of variable energy purchase rates on QF financing, the difference between cost-of-service recovery and avoided cost recovery, and the ability of QFs to obtain financing based on fixed, avoided capacity costs calculated at the time an LEO is incurred.

RESPONSE 6: The Commission appreciates the commenter's perspective and agrees with FERC's conclusions in Order 872 that QFs will be able to obtain financing based on a fixed avoided cost of capacity and variable avoided cost of energy.

COMMENT 7: One commenter provided a letter from KeyBank National Association evaluating how the shift from fixed to variable avoided cost of energy rates would impact QFs' financing options. In that letter, Ryan W. Pirnat, Managing Director of KeyBanc Capital Market Power, Utilities and Renewables group, said that variable revenue streams introduce uncertainty in an energy project's ability to service debt. According to Mr. Pirnat, lenders may take a more conservative view of a project's cash flow available to service debt, and a project with variable cash flows may not be able to leverage the project to the same extent that it would if it had fixed cash flows. Mr. Pirnat also observes that not all developers use leverage; many developers who leverage projects use debt to enhance returns and decrease equity holders' risk. Mr. Pirnat concludes that the shift to variable energy rates would impact the extent to which a project can be leveraged, but projects would still be financeable, and the overall impact of leverage may be negligible.

RESPONSE 7: The Commission appreciates the information provided by the commenter. This information generally mirrors FERC's findings in Order 872, which recognized that utility customers bear more risk when energy prices are fixed, and QF developers bear more risk when energy prices are variable. In either case,

FERC found QFs could be successfully financed and developed. The Commission agrees.

COMMENT 8: One commenter supported the amendments to ARM 38.5.1905(2) in order to better ensure ratepayer indifference between QF and non-QF sources of energy. The commenter noted that in Order 872, FERC considered the risk of overpayments inherent in long-term fixed-rate energy purchases and found that states should be given the flexibility to rely on more accurate variable avoided energy purchase rates. The commenter further observed that Congress did not intend to guarantee a rate of return or recovery of a QF developers' costs. The commenter noted that eliminating forecasting in energy pricing will avoid subjective forecasts of inputs such as electricity and natural gas prices.

RESPONSE 8: The Commission appreciates the commenter's perspective, agrees, and concludes that it is in the public interest to reduce the risk to utility customers and calculate avoided energy costs at time-of-delivery, which best reflects the utility's avoided costs. The Commission further observes that this change will substantially expedite proceedings before the Commission, which will reduce costs and delays that can discourage QF development.

COMMENT 9: One commenter said variable energy rates are fair because fixed energy rates are not generally required to finance electric generation facilities, and most renewable resources no longer need to rely on PURPA avoided cost rates to sell energy economically. The commenter highlighted several projects under development in Montana, including a 750-megawatt (MW) wind farm built by NextEra Energy Resources, LLC; a 335-MW wind farm developed by Haymaker Wind, LLC; and Clenera's 150-MW Cabin Creek solar farm. The commenter noted that Renewable Northwest has identified 30 wind and solar projects currently under development in Montana and about half of those projects are larger than PURPA's 80-MW threshold. The commenter concludes that these projects demonstrate that there is ample renewable energy development under way to compete with utility-owned resources.

RESPONSE 9: The Commission thanks the commenter for providing this information. The Commission agrees that this information shows thriving competition and renewable energy development in Montana, often without a guaranteed energy price under PURPA.

COMMENT 10: One commenter urged the Commission to revise ARM 38.5.1905(2) to retain the fixed energy purchase rate option, at least for QFs 5 MW or smaller in size. The commenter said the proposed rule would severely undermine the ability of small renewable energy projects to develop and operate. The commenter said developers need certainty in return on investment, but time-of-delivery energy purchase rates fail to meet that need. The commenter recommended the Commission retain the fixed energy rate option for all QFs. If the Commission does not retain this option for all years in the term, the commenter said it should be available for part of the term as it is in Oregon, with 15 years of fixed energy rates in

a 20-year term. The commenter asserted that QFs 5 MW and smaller tend to be less sophisticated and have less capital to manage financial uncertainty.

RESPONSE 10: The Commission appreciates the commenter's perspective, but declines to revise the proposed rule. As discussed above and in FERC's Order 872, it was not the purpose of PURPA to guarantee developers a certain return on investment. Regarding the commenter's suggestion to combine fixed and variable energy rates over the term of a power purchase agreement, the Commission believes that this will not achieve the Commission's goal of simplifying proceedings under PURPA. The Commission further notes that FERC did not distinguish between large and small QFs when it allowed time-of-delivery energy pricing in Order 872. The Commission therefore declines to revise the rule.

COMMENT 11: One commenter requested a revision to ARM 38.5.1908(2)(b), which requires utilities to file with the Commission by July 1 of each even-numbered year the utility's latest resource plan with any supplements. The commenter noted resource plans are not necessarily filed in even-numbered years or by July 1, and when they are filed, they are publicly available on the Commission's website. The commenter suggested that the rule should refer to the publicly available plans, rather than requiring utilities to file their plans.

RESPONSE 11: Under 18 CFR 292.302(b)(2), utilities are required to "provide" their plans for the addition of capacity to state regulators every two years. The Commission does not believe a reference to another filing would satisfy this requirement. Further, since most filings with the Commission are made electronically, the Commission does not anticipate the burden of submitting the plans will be substantial. The Commission acknowledges that resource plans are currently prepared every three years under Montana law. The timing of those plans, however, does not relieve utilities of the federal rule's requirement to "provide" the resource plan every two years. The Commission therefore declines to revise the rule.

COMMENT 12: One commenter supported proposed changes to the LEO rule in ARM 38.5.1909. The commenter said the revisions align with FERC's guidance regarding establishment of LEOs. The commenter notes that (1)(e) requires that QFs seeking payment for avoided capacity be studied for interconnection as a network resource. The commenter requests that this requirement be extended to avoided energy rates if the Commission does not adopt variable energy pricing.

RESPONSE 12: The Commission thanks the commenter for their support. Because the Commission adopts time-of-delivery energy pricing in this rulemaking, it declines to revise ARM 38.5.1909(1)(e).

COMMENT 13: One commenter requested additional language in ARM 38.5.1910(2) to ensure that the section applies only to QFs not eligible for tariffed rates. The commenter further asked that "avoided cost calculation" be changed to

"avoided capacity cost calculation" if the Commission requires variable avoided energy costs.

RESPONSE 13: The adoption of time-of-delivery energy rates will eliminate the need for proprietary modeling and forecasts of energy prices. Because a utility will not be modeling avoided energy prices for the QF, there will nothing to provide under the rule. The Commission also notes that its current rule is not limited to QFs not eligible for tariffed rates. The Commission has not heard any complaints that the current rule is burdensome or unworkable due to the lack of that limitation. The Commission therefore declines to revise the rule as requested.

COMMENT 14: One commenter requested additional language in ARM 38.5.1910(3), inserting "within its sole possession and control" after "additional data and information" to ensure that the parties' obligations are clear.

RESPONSE 14: The Commission does not believe the requested amendment is necessary. The sentence at issue requires utilities to provide additional information that may be necessary for a QF to calculate avoided costs with the QF's preferred methodology. The Commission anticipates this information will typically concern the operating characteristics of the utility's system. It is unclear how a QF could invoke this sentence to ask a utility for information that the utility does not already possess. Instead of revising the rule at this time, the Commission will consider complaints under this rule as they may arise.

COMMENT 15: One commenter expressed support for the adoption of NEW RULE I (38.5.1911) and NEW RULE II (38.5.1912), and the proposed amendments to ARM 38.5.1901, 38.5.1902, 38.5.1903, 38.5.1904, 38.5.1905, 38.5.1907, 38.5.1908, 38.5.1909, and 38.5.1910.

RESPONSE 15: The Commission thanks the commenter for their support.

COMMENT 16: One commenter stated that the Commission's notice of proposed rulemaking inaccurately concluded that the proposed rules would not significantly and directly impact small businesses. Specifically, the commenter said the Commission's proposal to calculate the avoided cost of energy at the time of delivery will "create barriers to financing, fail to foster and encourage the development of small business QFs as there is no certainty for price forecasts over a long-term contract, and it would violate Montana law for failing to comply with 69-3-604, MCA."

RESPONSE 16: The Commission disagrees with the commenter. In this case, the Commission determined that there would be no significant and direct impact on small businesses, which would trigger the requirement for a further small business impact analysis. A reasonably accurate forecast of market prices, by definition, would not differ substantially from actual market prices over the term of a power purchase agreement. The shift from forecasted avoided costs to rates based on time-of-delivery avoided costs should not significantly and directly affect the amounts paid to a QF over the term of a contract.

The Commission further notes that FERC considered arguments that variable energy pricing would impact financing for QFs, and concluded that ample opportunities for financing still exist. The Commission further notes that other comments submitted support the Commission's determination, as discussed in this notice.

COMMENT 17: One commenter proposed an amendment to the definition of "interconnection costs" in ARM 38.5.1901. In addition to incorporating FERC's definition of the term, the commenter asked the Commission to clarify that interconnection costs do not include costs related to "any alterations, modifications, or enhancements that are necessitated by a change in the utility's system voltage and occur at or beyond the point of interconnection." The commenter states that this addition would be "consistent with longstanding, foundational Commission PURPA policy" and the Montana Supreme Court's Opinion in *CED Wheatland Wind v. Mont. PSC*, 2022 MT 87.

RESPONSE 17: The Commission declines to make this revision. The Commission disagrees with the commenter's interpretation of the Commission's prior decisions regarding interconnection costs. The Commission has consistently held that upgrades required for interconnection to the utility grid system at the time that the QF interconnects are the cost burden of the QF. The Commission also disagrees with the commenter's interpretation of *CED Wheatland Wind*. The *CED Wheatland Wind* opinion cited the FERC definition the Commission adopts here as authority for its conclusion. The Commission therefore believes incorporating the rule by reference matches the direction the Montana Supreme Court gave in *CED Wheatland Wind*.

COMMENT 18: One commenter asked the Commission to define the terms "interconnection facilities" and "site control" in ARM 38.5.1901 by restating the current definitions of those terms in FERC's large generator interconnection procedures.

RESPONSE 18: Throughout this rulemaking, the Commission has attempted to move away from repeating the language of other statutes or rules, which may change over time and lead to discrepancies that require further rulemaking to resolve. The Commission therefore declines to incorporate the definitions as proposed by the commenter.

COMMENT 19: One commenter asked the Commission to revise the definition of standard rates to raise the threshold for qualifying for such rates from 3 MW to 10 MW. The commenter said that QFs of 3 MW or lower are "very difficult to finance." The commenter also said raising the threshold would reduce transaction costs for facilities between 3 MW and 10 MW in size.

RESPONSE 19: The Commission appreciates the commenter's perspective; however, the Commission declines to make this change at this time. The

Commission believes more information is needed to evaluate the effect of the change and encourages the commenter to petition for rulemaking with additional information.

COMMENT 20: One commenter stated that the Commission lacks legal authority to eliminate the option for an avoided cost of energy fixed at the time of the QF's LEO date. The commenter notes that FERC's decision to allow variable pricing for energy in Order 872 did not supersede the anti-discrimination requirement of PURPA.

RESPONSE 20: The Commission appreciates the commenter's perspective, but disagrees. The anti-discrimination provision of PURPA is satisfied as a matter of law when the rates paid to QFs are equal to the utility's avoided cost. The shift from forecasted rates, which may deviate substantially from the utility's avoided cost, to a rate calculated based on observed market prices should substantially improve the correlation between the utility's actual avoided cost and the rate paid to QFs. The Commission believes the rule as adopted improves overall compliance with PURPA, including the law's anti-discrimination requirement.

COMMENT 21: One commenter further argued that Montana's "mini-PURPA" at 69-3-601, MCA, prohibits variable energy pricing. The commenter noted that statute requires the Commission to set rates using avoided cost over the term of the contract.

RESPONSE 21: The Commission disagrees with the commenter's interpretation of 69-3-601, MCA. The Commission interprets "set" to mean that the rate paid to the QF is based on the avoided cost to the utility over the term of the contract. The Commission concludes that the avoided cost over the term of the contract is best represented by time-of-delivery pricing. The rate for QFs under the Commission's rule will therefore continue to be set based on the utility's avoided cost. The Commission further notes that a QF and a utility may agree to a fixed energy price term without the Commission's involvement.

COMMENT 22: One commenter said 69-3-604(2), MCA, requires the Commission to enhance the economic feasibility of QFs, which would not happen if the Commission allows energy rates to be calculated at the time of delivery.

RESPONSE 22: The Commission disagrees with the commenter's interpretation of 69-3-604(2), MCA. That statute requires the Commission to encourage "long-term contracts" to enhance the economic feasibility of QFs. The Commission's proposed rules do not address the length of contracts. The Commission intends to continue resolving disputes over contract length on a case-by-case basis, based on evidence presented by the parties and the policy established in the statute. Because the switch to time-of-delivery energy pricing does not affect contract length, 69-3-604(2), MCA, does not prevent the Commission from adopting this rule. In addition, the Commission notes that all QFs will still receive a fixed capacity payment through the term of the contract, which encourages QF development.

COMMENT 23: One commenter argues that utility-owned assets must also be valued at time-of-delivery rates before QFs can receive avoided energy payments calculated at time-of-delivery. The commenter states that this is required by PURPA's anti-discrimination provision. The commenter cites a recent Montana Supreme Court opinion (*Vote Solar v. Mont. Dep't of Pub. Serv. Reg.*, 2020 MT 213A) for the proposition that a utility's own resources and contracted resources receive a "guaranteed cost-recovery or rate of return." The commenter likewise argues that utilities must not be permitted to receive a so-called "reliability rider," which NorthWestern Energy has requested in its most recent general rate case.

RESPONSE 23: The Commission notes that the "reliability rider" proposed by NorthWestern is currently the subject of a contested case proceeding, and it is inappropriate for the Commission to pass judgment on the request in this rulemaking. The Commission disagrees that *Vote Solar* requires the Commission to apply cost-of-service ratemaking principles to QFs and thereby guarantee those facilities cost recovery or a rate of return.

In Order 872, FERC observed that "the incremental energy costs that an electric utility will recover from its retail customers at an incremental level would be the same energy costs that are used in determining the electric utilities' avoided costs that will, in turn, set the as-available avoided cost rates to be charged by QFs." FERC concluded that "[g]uaranteeing QFs cost recovery is fundamentally inconsistent with PURPA, which sets the rate the QF is paid at the purchasing electric utility's avoided cost, not at the QF's cost. Such a rate structure is not discriminatory." The Commission agrees with FERC. While utilities are paid on a cost-of-service basis, QFs are paid on an avoided cost basis. PURPA does not allow QFs to be paid on a cost-of-service basis.

COMMENT 24: One commenter requested an amendment to ARM 38.5.1909(1)(b)(ii) to clarify that the estimate provided to a utility is "non-binding" and made in "good faith."

RESPONSE 24: The Commission does not believe the requested revision is required. An estimate is, by definition, not a binding, final statement. The Commission also believes that a QF's "good faith" should be assumed, and not stated as a requirement of Commission rules.

COMMENT 25: One commenter requested that the Commission remove ARM 38.5.1909(1)(e). According to the commenter, that requirement does not demonstrate commercial viability or financial commitment on the part of the QF.

RESPONSE 25: A request to be studied as a network resource is necessary to identify and estimate all interconnection costs associated with the delivery of firm energy with firm transmission rights. A QF that has not requested such a study has not demonstrated a financial commitment for its share of the costs associated with the delivery of firm energy. Likewise, the Commission is not convinced that a QF

that has not requested such a study has demonstrated that its siting decision is commercially viable. The Commission therefore declines to revise the rule.

COMMENT 26: One commenter opposed the proposed amendments to ARM 38.5.1910(2), arguing that they would make avoided cost calculations less transparent.

RESPONSE 26: The Commission appreciates the commenter's perspective; however, the Commission believes the proposed revisions to the rule improve transparency. Under the prior Commission rule, the utility only needed to provide information used in the last Commission contested case to calculate avoided costs. The utility had no obligation to provide information that the utility intended to use when calculating avoided costs for the requesting QF. The rule as adopted fills that gap, while still allowing the QF to request additional information that may be required to calculate avoided costs under a different methodology, including the method last approved in a contested case.

COMMENT 27: One commenter asked the Commission to revise ARM 38.5.1910 to require parties to provide modeling software and source code in response to a request. The commenter asserted production of the software and source code was necessary to "verify the accuracy, data, and outputs of the model."

RESPONSE 27: The Commission declines to make the requested change. A rule requiring parties to produce software and source code would force parties to divulge trade secrets of non-parties. Although the Commission can grant protective orders to prevent such disclosure in the context of a contested case, this rule is designed to be applied before a contested case proceeding begins. The Commission will instead evaluate the merits of requests for the production of modeling software and source code in the context of contested cases. Finally, the Commission notes that (4) of the rule provides a reasonable process for parties to verify the accuracy, data, and outputs of one another's models.

COMMENT 28: One commenter asked the Commission to clarify that monetary sanctions under ARM 38.5.1910(5) are only available against utilities.

RESPONSE 28: The Commission does not believe the clarification is necessary. The rule as adopted states that the Commission may impose fines "as applicable." Monetary fines under 69-3-206 and 69-3-209, MCA, would be levied only as those statutes allow.

COMMENT 29: One commenter said the rules as drafted are too "pro-utility," and without competition from QFs, utilities will have no competition.

RESPONSE 29: The Commission appreciates the commenter's perspective, but disagrees that the rules adopted today are "pro-utility." As discussed in response to prior comments, the decision between fixed and variable pricing is one of risk allocation between QF developers and utility customers. The utility passes the costs

of QF energy on to customers and bears no risk of inaccurate forecasting. Adopting time-of-delivery energy pricing mitigates the risk to customers that they will substantially overpay for energy from QFs. And, as noted in prior comments, there is substantial renewable energy development underway in Montana, outside the context of PURPA.

COMMENT 30: One commenter said that, although there have been abuses of the PURPA framework, there were no examples of that in Montana. According to the commenter, the current system of forecasting energy prices can lead to disagreements, which may be "driven by the market."

RESPONSE 30: All forecasts will differ from actual avoided costs. Whether or not that difference is due to a party intentionally "abusing" PURPA is a question for individual contested cases. In this rulemaking, the Commission seeks to mitigate risks associated with forecasted avoided energy costs, regardless of their cause. The Commission also seeks to reduce the scope of disputed issues in PURPA proceedings through time-of-delivery energy rates, which may be "driven by the market," as the commenter suggested.

COMMENT 31: One commenter noted that the author of the dissenting opinion in FERC's Order 872 is now the FERC chairman.

RESPONSE 31: The Commission appreciates the commenter's observation; however, Order 872 remains the current guidance to states on PURPA implementation. The Commission believes its current rulemaking mirrors that guidance.

COMMENT 32: One commenter compared this rulemaking to a separate rulemaking process concerning utility resource planning and said the combination of the two rules would kill independent power production that can compete with utilities in Montana.

RESPONSE 32: The Commission appreciates the commenter's perspective. The Commission's rulemaking on resource planning is the subject of a separate notice published in the Montana Administrative Register. The Commission disagrees that the net effect of the rules as adopted will kill independent power production in Montana.

COMMENT 33: One commenter said that it is better to have QFs developed in Montana and provide jobs for Montanans than to have utilities purchasing energy from other states.

RESPONSE 33: The Commission appreciates the commenter's perspective. As demonstrated by information provided by other commenters, independent power projects continue to be developed in Montana, without a guaranteed energy price under PURPA. The Commission anticipates that developers of QFs and non-QFs will continue to build projects in Montana under the current rules. Finally, the

Commission notes that job creation is not a factor the Commission is permitted to consider when calculating avoided costs under PURPA and FERC regulations.

COMMENT 34: One commenter said that, if these rules curtail independent energy development in Montana, the Commission will need to be prepared to take a closer look at each utility's costs. The commenter said this burden will be greater without competitive pressure from QFs.

RESPONSE 34: One of the Commission's duties is to thoroughly examine all costs involved in a utility's rates and evaluate whether the utility's management is making prudent decisions. The Commission does not agree that competition can relieve the Commission of its duties to conduct a full examination of a utility's costs and decisions. The Commission intends to continue fulfilling this duty in all cases.

/s/ LUCAS HAMILTON
Lucas Hamilton
Rule Reviewer

/s/ JAMES BROWN
James Brown
President
Public Service Commission

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 38.5.2202 and 38.5.2302 pertaining to pipeline safety	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Department of Public Service Regulation published MAR Notice No. 38-5-257 pertaining to the proposed amendment of the above-stated rules at page 1640 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has amended the above-stated rules as proposed.

3. No comments or testimony were received.

/s/ LUCAS HAMILTON
Lucas Hamilton
Rule Reviewer

/s/ JAMES BROWN
James Brown
President
Public Service Regulation

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I and the amendment of ARM 42.12.106, 42.12.111, 42.12.118, 42.12.133, 42.12.143, 42.12.145, 42.12.146, 42.12.147, 42.12.149, 42.12.209, 42.12.301, 42.13.106, 42.13.111, 42.13.405, 42.13.601, 42.13.802, 42.13.1102 through 42.13.1105, and 42.13.1202 pertaining to department implementation of legislation for House Bills 157, 226, 525, 705 and Senate Bill 320 enacted by the 2021 Montana Legislature	)	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On July 22, 2022, the Department of Revenue published MAR Notice No. 42-1052 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 1246 of the 2022 Montana Administrative Register, Issue Number 14.

2. On August 12, 2022, a public hearing was held to consider the proposed adoption and amendment. The following persons were present but provided no oral testimony: Shauna Helfert, Gaming Industry Association of Montana (GIA); John Iverson, Montana Tavern Association (MTA); Jessie Luther, Taylor Luther Group, PLLC, representing the Hospitality and Development Association of Montana.

3. On August 15, 2022, the MTA provided the department its written comments and concerns with the proposed amendments to ARM 42.12.149(3). The comments were also brought before the Economic Affairs Interim Committee (EAIC) at its August 16, 2022 meeting.

4. On August 16, 2022, prior to the interim committee meeting, the department filed an amended notice of public hearing on the proposed adoption and amendment of the above-stated rules (amended proposal notice). The amended proposal notice, which contained the department's changes to the original proposal notice described in paragraph 1, attempted to resolve the MTA's concerns in paragraph 3 and Comment 1 (below) and to maintain the department's schedule of adoption and amendment of the rulemaking to comply with 2-4-305(11), MCA.

5. Notwithstanding the MTA's appearance at the August 16 interim committee meeting and the withdrawal of its concerns based on the amended proposal notice, EAIC voted to object to the entire rulemaking pursuant to 2-4-

305(9), MCA. EAIC provided formal notice of the objection to the department by its written correspondence of August 17, 2022.

6. The amended proposal notice was published on August 26, 2022, at page 1686 of the 2022 Montana Administrative Register, Issue Number 16. No additional public hearing was held to consider the amended proposal notice. The department extended the comment period for the proposed rulemaking in accordance with 2-4-305(8), MCA, until September 2, 2022.

7. The following persons provided written comments to the rulemaking: Ms. Helfert, GIA; Mr. Iverson, MTA; Michael Lawlor, attorney, Lawlor & Co., PLLC; Allen Hodges, Undammed Distilling Co., LLC; Susan Young, Chief Operating Officer, Westslope Distillery; Willie Blazer, President, Willie's Distillery, Inc.; Ryan Montgomery for Montgomery Distilling and the Montana Distiller's Guild (Guild); Jim Harris, Bozeman Spirits Distillery; Steffen Rasile and Tyrell Hibbard, Gulch Distillers; and Jeffrey Miser, Mountain Wave Distilling.

8. EAIC met on the morning of September 13, 2022, and withdrew its objection to this rulemaking.

9. The department has adopted New Rule I (42.12.152) and amended ARM 42.12.106, 42.12.111, 42.12.118, 42.12.143, 42.12.147, 42.12.209, 42.12.301, 42.13.106, 42.13.111, 42.13.405, 42.13.601, 42.13.802, 42.13.1102 through 42.13.1105, and 42.13.1202 as proposed in the original proposal notice published on July 22, 2022.

10. The department has amended ARM 42.12.149 as presented in the amended proposal notice published on August 26, 2022.

11. The department has amended ARM 42.12.133, 42.12.145, and 42.12.146 as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

42.12.133 CONCESSION AGREEMENTS (1) through (6) remain as proposed.

(7) All concession agreements must be renewed on or before June 30 of each year by ~~completing and submitting a department prescribed renewal form and~~ paying the renewal fee provided in 16-4-418, MCA. Failure to ~~submit a completed renewal form and~~ pay the renewal fee may result in the denial of renewal of the concession agreement.

(8) remains as proposed.

AUTH: 16-1-303, MCA
IMP: 16-3-305, 16-3-311, 16-4-401, 16-4-402, 16-4-418, MCA

42.12.145 ON-PREMISES CONSUMPTION BEER AND ALL-BEVERAGE LICENSE - PREMISES SUITABILITY REQUIREMENTS (1) remains as proposed.

(2) The premises of an on-premises consumption beer or all-beverage retailer may be considered suitable only if:

(a) through (d) remain as proposed.

(e) the premises are located in one building or a specific portion of one building, except that a patio/deck may extend the premises beyond the interior portion of the building. The interior portion of the premises must comply with the requirements of 16-3-311(3), MCA. Subject to the exceptions in 16-3-311~~(2),~~ (8)~~,~~ and (9), MCA, if the premises are located in a portion of a building, the premises must be separated by permanent floor-to-ceiling walls from any other business, including any other business operated by the licensee. Except as otherwise provided in 16-3-311(8) and (9), MCA, the only access from the premises to another business may be through a single lockable door, no more than six feet wide, in the permanent floor-to-ceiling wall. Additional lockable doors in the permanent floor-to-ceiling wall may be allowed only upon department approval;

(f) through (5) remain as proposed.

AUTH: 16-1-303, MCA

IMP: 16-3-244, 16-3-309, 16-3-311, 16-3-312, 16-4-213, 16-4-402, 16-4-405, 16-4-418, MCA

42.12.146 RESTAURANT BEER AND WINE LICENSE - PREMISES SUITABILITY REQUIREMENTS (1) remains as proposed.

(2) The premises of a restaurant beer and wine retailer may be considered suitable only if:

(a) through (d) remain as proposed.

(e) the premises are located in one building or a specific portion of one building, except that a patio/deck may extend the premises beyond the interior portion of the building. The interior portion of the premises must comply with the requirements of 16-3-311(3), MCA. Subject to the exceptions in 16-3-311~~(2),~~ (8)~~,~~ and (9), MCA, if the premises are located in a portion of a building, the premises must be separated by permanent floor-to-ceiling walls from any other business, including any other business operated by the licensee. Except as provided in 16-3-311(8) and (9), MCA, the only access from the premises to another business may be through a single lockable door, no more than six feet wide, in the permanent floor-to-ceiling wall. Additional lockable doors in the permanent floor-to-ceiling wall may be allowed only upon department approval;

(f) through (5) remain as proposed.

AUTH: 16-1-303, MCA

IMP: 16-3-244, 16-3-309, 16-3-311, 16-3-312, 16-4-402, 16-4-405, 16-4-421, MCA

12. The department has thoroughly considered the comments and testimony received. A summary of the comments received, and the department's responses are as follows:

COMMENT 1: As described in paragraph 3, the MTA provided written comments to EAIC which were the basis for the committee's August 16 objection. The core of MTA's comments asserts that the department's proposed revisions to ARM 42.12.149(3) exceed the department's rulemaking authority. The MTA also contends the amendment of ARM 42.12.149(3) would create more discord and consumer confusion and the ". . . issue [of allowing distilleries to operate more than one manufacturing facility at noncontiguous locations] is best resolved through the legislative process."

RESPONSE 1: The department disagrees that the rulemaking authority granted to it by the legislature under 16-1-201, MCA, restricts the department's ability to amend ARM 42.12.149(3) for consistency with the federal regulation with respect to noncontiguous manufacturing facilities for alcoholic beverage manufacturing, including distilleries. Notwithstanding, the department acknowledges the immediacy of the issue to the upcoming 68th Montana Legislature and the possibilities for a legislative solution. The department also weighed the adoption of its entire legislative implementation rules package with and without the objectionable rule amendment. It was through this analysis that the department filed the amended proposal notice.

Regarding the MTA's comments that the amendment of ARM 42.12.149(3) would create more discord and consumer confusion, the department cannot provide a substantive response because the comment is an opinion for which the MTA provides no foundation.

COMMENT 2: Mr. Lawlor opined the department is within its legislatively designated authority to align manufacturer licensed premises criteria with its federal counterpart. Mr. Lawlor continues that the department's proposed amendments in this rulemaking correct department error made in past rules packages and provided support for his argument.

Similarly, the Guild, Messrs. Montgomery, Hodges, Blazer, Harris, Rasile, Hibbard, and Miser, and Ms. Young (collectively, the distillery commenters) all commented that the department's requirements in ARM 42.12.149(3) are inconsistent with federal requirements for noncontiguous manufacturing facilities and requested that the department reverse its action in the amended proposal notice and adopt the proposed amendment in the July 22, 2022 original proposal notice.

RESPONSE 2: The department appreciates Mr. Lawlor's and the distillery commenters' support for the department's continuing effort to improve consistency in its administrative rules, but refers them to Response 1 and the department's decision to defer to possible legislative resolution of the issue.

COMMENT 3: The distillery commenters reiterated in their respective comments that the issue is not about the expansion of retail opportunity or sample rooms; it is the ability to grow in manufacturing through the use of noncontiguous facilities - often within urban settings which have limited availability of adequate or affordable real estate.

The distillery commenters also challenged the MTA's position that the amendment of ARM 42.12.149(3) would create more discord and consumer confusion as baseless and contrary to prior understandings between the MTA and the Guild as members of the alcoholic beverage coalition.

RESPONSE 3: The department understands the distillery commenters' comments about the need to expand manufacturing through the use of noncontiguous facilities, especially in urban areas. However, there are genuine disputes between the MTA and the Guild, which are outside the scope of this rulemaking and, as a matter of public policy, the department's preference is for legislative guidance or resolution.

COMMENT 4: Mr. Lawlor commented on New Rule I that 16-4-213, MCA, could be interpreted to permit more than one noncontiguous storage area and he requests the department concur with that conclusion and amend the rule upon adoption to that effect.

RESPONSE 4: Mr. Lawlor appears to confuse the applicable statutes that were amended by House Bill 705 (HB 705)(2021). HB 705 amended 16-3-311(6), MCA, to provide for a noncontiguous storage area for retail licensees, while 16-4-213(8), MCA, provides for a resort alternate alcoholic beverage storage facility for a resort retail all-beverage licensee or a retail all-beverages licensee within the boundaries of the resort. The respective storage area alternatives, while procedurally similar in application and approval, are substantively different.

The department respectfully disagrees with Mr. Lawlor's interpretation that either law would allow multiple storage areas. The legislature unambiguously provides for only one such alternate storage area/facility: "A licensed retailer may apply to the department to have a noncontiguous storage area that is under the control of the licensed retailer. . . ."; and "If a resort area has two or more resort retail all-beverage licenses or retail all-beverages licenses within the boundaries of the resort, the licensees may also apply to use a resort alternate alcoholic beverage storage facility to be located within the resort area. 16-3-311(6), MCA, and 16-4-213(8), MCA, respectively (emphasis added).

Based on the plain language of the respective statutes, the department declines to revise New Rule I upon adoption based on these comments.

COMMENT 5: The GIA provided several suggested edits to New Rule I that it claims would simplify the rule, namely striking several internal references to noncontiguous alcoholic beverage storage area or resort alternate alcoholic beverage storage facility, and in some instances replacing them with the term "premises."

RESPONSE 5: New Rule I already represents the consolidation of application procedures and requirements for both statutory alcoholic beverage storage types instead of having two rules that could be largely repetitive. The department finds the suggested edits would be brevity in the extreme to the detriment of the rule. Further, the word "premises" is already defined in ARM

42.12.106(32), and confusion would only increase if it was applied as the GIA requests.

Based on this reasoning, the department declines to adopt the GIA's suggested revisions.

COMMENT 6: The GIA proposed edits to New Rule I(3) to add that a noncontiguous alcoholic beverage storage area or resort alternate alcoholic beverage storage facility must be onsite and cannot be used to serve alcoholic beverages.

The GIA also asks the department to include additional permissible uses in the description of a noncontiguous alcoholic beverage storage area or resort alternate alcoholic beverage storage facility such as storage of equipment of food items.

RESPONSE 6: The GIA's proposed edits to New Rule I(3) do not add clarity or fit because the rule section is not limited to a noncontiguous alcoholic beverage storage area. In drafting New Rule I(1), the department intentionally references 16-3-311, MCA, for what constitutes a suitable premises, including a noncontiguous alcoholic beverage storage area. In drafting New Rule I(2), the department intentionally references 16-4-213, MCA, for what constitutes a compliant resort alternate alcoholic beverage storage facility.

The department contends the prohibitions in New Rule I(8) and (9) provide satisfactory information and deterrence regarding the selling, giving away, or consumption of alcoholic beverages at a noncontiguous alcoholic beverage storage area or resort alternate alcoholic beverage storage facility.

As to the GIA's request for additional storage use approval notwithstanding the terms in New Rule I(3), the department agrees that a licensee's storage of food inventory, equipment, etc. is permissible, provided the use is limited to the licensee and all other storage facility safeguards in statute and rule are observed. It defeats the purpose of the laws that created these storage alternatives if a licensee's use of them is for general purposes and not for the storage of alcoholic beverages. And while the department approves of the above-described ancillary storage uses, the text of the rule will be adopted as proposed and the enforcement of the rule is subject to the department's discretion.

COMMENT 7: The GIA requests the department remove the proposed definition in ARM 42.12.106(32) solely because the definition is provided in statute.

RESPONSE 7: House Bill 226 (2021) implemented new terminology when it allowed for curbside service of alcoholic beverages in original packaging, prepared servings, or growlers depending on the type of license. Because of this change, the department believes it is necessary to clarify serving size.

The department declines to remove the definition for the reasons provided above and because the inclusion of statutory language in administrative rule is not prohibited. Section 2-4-305, MCA, provides rules may not unnecessarily repeat statutory language. The department's inclusion and maintenance of statutory language in the definition is necessary for transparency, context, and attribution to

the underlying law.

COMMENT 8: The GIA requests that the department make additional revisions to ARM 42.12.118 to include a prospective (2)(d) that would add the circumstance of ownership changes of two or more qualified owners (owners of 15% or more) to the list of transactions that require an abbreviated application within 90 days of the change. The GIA asserts that these transaction(s) should be allowable without prior notification to the department. The GIA supports its argument with changes made under Senate Bill 49 (2021)(SB 49) and the prospect of eliminating administrative red tape.

RESPONSE 8: What the GIA seeks by its comment exceeds the scope of this rulemaking nor is it supported by 16-4-415, MCA, or SB 49.

SB 49 was proposed by the Gaming Advisory Council for the gaming industry. The department stated at the initial senate hearing for SB 49 that, occasionally, the department's alcohol licensing laws differ from the gaming operator laws of the Department of Justice. Such is the case between 23-5-118, and 16-4-415, MCA, and the differences are not administrative red tape. Mr. Iverson appears to concur with this understanding as he also testified at the same hearing that any similar SB 49 change for alcoholic beverage licensees would require an act of the legislature to change Title 16, MCA.

The department notes that ARM 42.12.118(3)(a) already provides that qualified owners (i.e., owners of 15% or more) must submit an abbreviated application prior to consummation of an internal ownership change. While this does require prior department approval, the application and approval process is an abbreviated one.

COMMENT 9: Mr. Lawlor provided commentary that the department should reconsider the concession agreement renewal requirements in proposed ARM 42.12.133(7) and (8) because renewal forms are necessary for licenses, not concession agreements, and the return of payment with the payment coupon generated from the department's system should be sufficient for concession renewal.

RESPONSE 9: The department appreciates Mr. Lawlor's comments pertaining to ARM 42.12.133(7), and the department has amended the section upon adoption in response to the comments. However, the department does not agree with the need for any additional revision to ARM 42.12.133(8) because license renewal obligations have direct bearing on the renewal of a concession agreement. Stated differently, a concession agreement cannot be renewed if the license involved in the concession has not been renewed or cannot be renewed.

COMMENT 10: Mr. Lawlor commented that the suitability of premises requirements amendments in proposed ARM 42.12.145(1) should be changed because suitability determination is not necessary with the addition of a new concession agreement unless the addition of the concession agreement changes the physical premises. He continues that it is an unnecessary regulatory and

compliance burden on both the department and on businesses.

The GIA shares the same commentary and believes the situation described in ARM 42.12.145(1) applies under (4). The GIA contends that House Bill 525 (2021)(HB 525) did not include the additional requirement and that the amendment in (1) exceeds the department's rulemaking authority.

RESPONSE 10: The department respectfully disagrees with Mr. Lawlor's and the GIA's interpretation that the department's authority to determine suitability of the premises is limited under 16-4-418, MCA, or is solely determined when an alteration of the premises changes incidental to a new concession agreement.

When a licensee and a concessionaire apply to operate under a concession agreement, as stated in the amendment to ARM 42.12.145(1), the expansion of the service area for alcoholic beverages into a previously nonlicensed area requires a determination of contiguous premises, as described in 16-4-418, MCA. This is but one element of premises suitability, as determined under 16-3-311, MCA, and ARM 42.12.145. For example, the department has encountered proposed concession arrangements where the interrelationship of the two premises was not contiguous, as required, or where one premises was suitable for building, health, and fire code compliance, but the other was not despite the premises being contiguous.

As to the GIA's comment that HB 525 did not include the additional premises requirement and the department exceeds it rulemaking authority, the department reiterates the preceding paragraphs and that neither HB 525 nor 16-4-418, MCA, are the primary authority for premises suitability. Since compliant alcoholic beverage concessions are conditioned, in part, upon premises suitability, the department is not exceeding its rulemaking authority under 16-1-303, MCA, or in the implementation of 16-4-418, MCA, in ARM 42.12.145.

The department declines to revise the requirement because the conditions in (1) are clearly stated.

COMMENT 11: The GIA commented that the department's amendments to ARM 42.12.145(2)(e) and 42.12.146(2)(e) failed to strike the reference to 16-3-311(2), MCA, which is no longer necessary.

RESPONSE 11: The department agrees and the two rule sections have been revised upon adoption based on the comments.

COMMENT 12: The GIA commented its concerns that ARM 42.12.149(2)(f) - a rule applicable to manufacturers - contains retailer premises suitability requirements cross-referenced from 16-3-311, MCA.

RESPONSE 12: While the department understands the GIA's concerns, 16-1-303, MCA, broadly authorizes the department to include rules regarding the subject matter. See 16-1-303(2)(k), (l), and (m), MCA. Section 16-3-311, MCA, also provides the department and licensees with specific suitability requirements and ARM 42.12.149, adopted to apply similar suitability requirements to manufacturers, has been the same since its adoption under MAR Notice No. 42-2-967 in 2017.

Since that time, and as Ms. Helfert is aware, the department has desired that manufacturer premises suitability requirements have the greatest degree of parity with on-premises consumption license requirements, as is possible, since manufacturers operate sample rooms and conduct other retail sales authorized under 16-4-312, MCA. See ARM 42.12.149(2)(a) through (g) for reference.

Section 16-3-311(3), MCA, as amended, requires the interior portion of the premises to be a continuous area under the control of the licensee and addresses multiple floors and common area shared by multiple building tenants in the same building, including entryways, hallways, stairwells, and elevators.

ARM 42.12.149(2)(f) and (g) now meet those requirements to maintain parity with on-premises consumption licensees and contain amendments which refer to the suitability of premises exception that was created by House Bill 157(2021) amendments to 16-3-311, MCA, regarding a retail on-premises licensee being adjacent to a brewery and winery.

COMMENT 13: The GIA commented that the department's amendments to ARM 42.13.1102 through 42.13.1104 should reference the word "onsite" to comply with the law and provide additional context (i.e., a definition) to what "onsite" means for clarity.

RESPONSE 13: Inclusion of the term "onsite" is not a requirement for any of the rules to comply with the law. Section 16-3-311(6), MCA, sufficiently describes a noncontiguous alcoholic beverage storage area, and New Rule I provides additional context making inclusion of the requested word unnecessary.

Neither does the GIA provide any substantiation or information regarding its request that the department define what "onsite" means. At this time, the department is unpersuaded that defining a common term would lend any greater understanding of what is permitted under 16-3-311(6), MCA, or the department's application and approval process under New Rule I. Accordingly, the department declines to incorporate the suggestion into the rules.

13. The effective date of these rules is September 26, 2022.

/s/ Todd Olson
Todd Olson
Rule Reviewer

/s/ Brendan Beatty
Brendan Beatty
Director of Revenue

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I and the amendment of ARM 42.20.102 pertaining to property tax exemption process revisions	))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On July 22, 2022, the Department of Revenue published MAR Notice No. 42-1054 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 1274 of the 2022 Montana Administrative Register, Issue Number 14.

2. On August 15, 2022, the department held a public hearing to consider the proposed adoption and amendment. The only attendee at the hearing was Robert Story, Executive Director of the Montana Taxpayers Association. The department also received written comments from Troy Lindquist, CPA.

3. The department has amended ARM 42.20.102 as proposed.

4. The department has adopted New Rule I (42.20.102A) as proposed but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE I (42.20.102A) ADDITIONAL DOCUMENTATION REQUIREMENTS FOR PROPERTY TAX EXEMPTION APPLICATIONS

(1) remains as proposed.

(2) For property used for religious purposes:

(a) remains as proposed.

(b) proof that the church's land parcel does not exceed 15 acres or one acre for a clergy residence ~~when~~ if the land and improvements are used for educational or youth recreational activities, and are available for public use; and

(c) through (18) remain as proposed.

AUTH: 15-1-201, MCA
IMP: 15-6-201, 15-6-203, 15-6-209, 15-6-221, 15-6-235, MCA

5. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT 1: Mr. Story provided commentary in support of the rulemaking because it clarifies and improves the property tax exemption application process. Mr. Story also commended the department for its inclusion of examples in its

administrative rules because the examples should provide relatable information that fit most taxpayer scenarios.

RESPONSE 1: The department thanks Mr. Story for his valuable input to this rulemaking.

COMMENT 2: Mr. Lindquist provided commentary in support of the rulemaking and cleaning up the property tax exemption application process related to the Governor's Red Tape Relief Initiative. Mr. Lindquist also provided suggestions for amendment to New Rule I(2)(a), (b), and (c), and (5)(a), upon adoption, to substitute the word "proof" with "provide documentation."

Mr. Lindquist also suggested a revision to New Rule I(2)(b) which, in his opinion, more closely aligns with what is provided in 15-6-201(1)(b), MCA.

RESPONSE 2: The department thanks Mr. Lindquist for his valuable input to this rulemaking.

Mr. Lindquist's requests are well taken, but the department's use of the word "proof" in New Rule I(2)(a), (b), and (c), and (5)(a) is intended to make it easier for the applicant of the exemption to satisfy the requirements of the rule. While the department believes that it is in agreement with Mr. Lindquist as to the substantive requirements of the rule, the differences amount to semantics and the department is not compelled to revise the rule.

As for Mr. Lindquist's opinion that New Rule I(2)(b) should be amended to replace the word "when" with "if" because that is what is provided in 15-6-201(1)(b), MCA, the department responds that both fulfill the conditional connection of the stated requirement and the difference amounts to semantics; however, the department has revised the rule in response to the comment.

/s/ Todd Olson	/s/ Brendan Beatty
Todd Olson	Brendan Beatty
Rule Reviewer	Director of Revenue

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.20.118 pertaining to tribal government applications for temporary property tax exemption	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Department of Revenue published MAR Notice No. 42-1055 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1643 of the 2022 Montana Administrative Register, Issue Number 15.

2. On August 26, 2022, the department held a public hearing to consider the proposed amendment. The only attendee at the hearing was Robert Story, Executive Director of the Montana Taxpayers Association (Montax). Mr. Story also provided written comments on behalf of Montax.

3. The department has amended ARM 42.20.118 as proposed but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

42.20.118 TRIBAL GOVERNMENT APPLICATION FOR A TEMPORARY PROPERTY TAX EXEMPTION (1) through (3) remain as proposed.

(4) ~~The department will provide written notification to the county treasurer when an application is received and will identify the subject property. The department will also provide the county treasurer with a copy of all approved applications for the county.~~ The department will provide the following to the county treasurer:

(a) prior to approving an exemption application, written notification that an application is received; and

(b) after the department approves an application, a copy of the approved application.

(5) If a tribe's written request or trust application is denied by the BIA or the five-year exemption period expires while a trust application remains pending before the BIA, the department will:

(a) remains as proposed.

(b) provide the county treasurer with the taxable values for each property ~~and~~ for each year there was a temporary exemption approved for applications received on or after May 7, 2021.

(6) and (7) remain as proposed.

AUTH: 15-1-201, 15-6-230, MCA
IMP: 15-6-230, 15-6-235, MCA

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT 1: Mr. Story provided commentary in support of the rulemaking because it clarifies and improves the temporary tribal tax exemption application process and the changes implement Senate Bill 214 (2021) as the law intended.

RESPONSE 1: The department thanks Mr. Story and Montax for their support and involvement in this rulemaking.

COMMENT 2: Mr. Story provided suggestions for amendments to ARM 42.20.118(4) and (5)(b), upon adoption, to separate concepts in (4) and to substitute the word "and" with "for" in (5)(b) to improve clarity of the department's duties under the respective rule sections.

RESPONSE 2: The department thanks Mr. Story for his valuable input and suggestions to this rulemaking. Based on these comments, the department has revised ARM 42.20.118(4) and (5)(b), upon adoption, as described above.

/s/ Todd Olson
Todd Olson
Rule Reviewer

/s/ Brendan Beatty
Brendan Beatty
Director of Revenue

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.39.310 pertaining to a waste management process revision	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Department of Revenue published MAR Notice No. 42-1060 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1648 of the 2022 Montana Administrative Register, Issue Number 15.

2. On August 26, 2022, the department held a public hearing to consider the proposed amendment. The attendees at the hearing were Pepper Peterson, President and Chief Executive Officer of the Montana Cannabis Guild (Guild), and Chris Beuthien with Sweetgrass Consulting. The department also received written comments from Kaari Fulton, Armadillo Buds, Bill Metzler, and Michael Block, Director of Public Policy, LeafLink.

3. The department has amended ARM 42.39.310 as proposed but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

42.39.310 WASTE MANAGEMENT (1) through (9) remain as proposed.

(10) After the expiration of the 72-hour period in (9), a licensee may dispose of marijuana ~~stalks and stems~~ waste other than usable marijuana as defined in 16-12-102, MCA, without rendering ~~them~~ it unusable pursuant to (3) by releasing them to a third-party contractor to render them unusable. A licensee must provide the department with a copy of the waste removal agreement with the third-party contractor before commencing services and must maintain the contract in the binder of documents required by ARM 42.39.105(6). The third-party contractor may process marijuana stalks and stems into non-marijuana products or otherwise render the marijuana stalks and stems unusable.

AUTH: 16-12-112, MCA
IMP: 16-12-103, 16-12-105, 16-12-112, 16-12-203, 16-12-210, MCA

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT 1: Mr. Petersen provided general commentary in support of the rulemaking. He also commented that part of the Guild's mission statement is creating sustainable industry. Mr. Petersen requested the department clarify that animal usage (i.e., farm animals) of stalks and stems for animal bedding in an

agricultural setting or for other agricultural purposes could be documented. This would be an allowable self-destruction of product.

Mr. Peterson also requested that sustainability not be limited to third-party contractors and the department allow producers themselves to direct their sustainable waste management, recognizing the entrepreneurial possibilities and not limiting them.

Mr. Petersen also commented that waste removal should not negatively impact Montana's hemp industry and opined that the omission of stems from statutory consideration involving waste may be drawn back to hemp farmers.

Mr. Beuthien expressed his support for, and concurred in, Mr. Peterson's comments.

RESPONSE 1: The department thanks Mr. Petersen, the Guild, and Mr. Beuthien for their support and involvement in this rulemaking. The department agrees that the expansion of waste management protocols towards improved sustainability for the industry is a good topic as a part of the department's rulemaking goals under 16-12-112(1)(o), MCA. Reluctantly, the department cannot accommodate these additional amendment requests because they exceed the somewhat limited scope of this rulemaking - in that they involve rule sections not subject to any proposed amendment - and would not be subject to the public review and comment requirements of the administrative procedure act.

COMMENT 2: Mr. Beuthien also commented that the department has not taken advantage of composting and other, more advanced post-production use of marijuana waste. Mr. Beuthien also noted that Montana's urban producers do not have the ability to remove marijuana waste in the same manner as their rural counterparts, and he requests thought be put into expanding allowable waste protocols based on the challenges of urban producers.

RESPONSE 2: The department thanks Mr. Beuthien for his valuable input and suggestions to this rulemaking and refers him to Response No. 1.

COMMENT 3: Mr. Metzler, in addition to his overall support of this rulemaking, provided substantial written commentary regarding the apparent new industry (to Montana) of marijuana refuse/biomass waste conversion. From Mr. Metzler's correspondence, the industry provides the processing of organic plant matter and other biomass waste material into valuable products for the cosmetic, textile, farming, and energy sectors. The biomass process also involves equipment specific to terpene harvesting which can be put to work with the cannabis waste material locally in Montana. Mr. Metzler further commented that marijuana stalks, stems, and leafy material can all be utilized to process marijuana waste into non-marijuana products.

RESPONSE 3: The department appreciates Mr. Metzler's comments, his support for this rulemaking and the direction of the department's Cannabis Control Division, and his advocacy for the development of marijuana refuse/biomass waste conversion. Notwithstanding Mr. Metzler's obvious technical knowledge about the

subject matter, much of his written comments are beyond the scope of this rulemaking and are best-directed at the Governor and the Montana Legislature for public policy and statutory changes to Montana's regulation of the cannabis industry. In response to Mr. Metzler's comments about the ability to take and use "leafy material," the department has amended (10), upon adoption, to clarify that only the parts of the marijuana plant that the legislature has defined as "unusable" may be taken by third parties for further processing.

COMMENT 4: Ms. Fulton commented her understanding of the rule amendments to require that dispensaries contract out a third party to verify whether a marijuana plant "has died." She also provided commentary about her struggles as a medical-only dispensary operator and challenges with packaging and labeling requirements for marijuana products.

RESPONSE 4: The department directs Ms. Fulton to the department's statement of reasonable necessity in the original proposal notice which explains the proposed amendment (i.e., to allow a marijuana licensee to dispose of marijuana stalks and stems in a more sustainable manner). As for Ms. Fulton's other comments, they are expressions of opinion outside the scope of this rulemaking, and the department believes it cannot provide a constructive response.

COMMENT 5: Mr. Block provided commentary that LeafLink is a cannabis technology company that manages product orders across its business-to-business platform across 25+ states and territories. While LeafLink is not a licensed marijuana business in Montana, it works with licensees in several states and values the opportunity to weigh in on proposed rules that will assist them and consumers.

LeafLink strongly supports the department's decision to improve waste management within the marijuana industry. The changes that allow for third-party contractors to dispose of stalks and stems will help businesses, environmental conditions, public safety, and even consumers. LeafLink contends that third-party contractors are often better suited to handle the disposal of marijuana waste safely and efficiently. And the more Montana allows specialized businesses and contractors to licensees in the way they support businesses in every other industry, the more efficient and safer the market will be.

RESPONSE 5: The department thanks Mr. Block for the comments and LeafLink's support of this rulemaking.

/s/ Todd Olson
Todd Olson
Rule Reviewer

/s/ David R. Stewart for
Brendan Beatty
Director of Revenue

Certified to the Secretary of State September 13, 2022.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.15.804 and 42.15.806 and the repeal of ARM 42.15.808 pertaining to Montana Education Savings Plans (529 plans)	)))))	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On August 5, 2022, the Department of Revenue published MAR Notice No. 42-1061 pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules at page 1650 of the 2022 Montana Administrative Register, Issue Number 15.

2. On August 26, 2022, the department held a public hearing to consider the proposed amendment and repeal. There were no commenters present to provide testimony or commentary for the rulemaking. The department did not receive any written comments in support or opposition to the proposed amendment and repeal.

3. The department has amended ARM 42.15.804 and 42.15.806 as proposed and repealed ARM 42.15.808 as proposed.

/s/ Todd Olson
Todd Olson
Rule Reviewer

/s/ Brendan Beatty
Brendan Beatty
Director of Revenue

Certified to the Secretary of State September 13, 2022.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 1.2.419 pertaining to the scheduled dates for the 2023 Montana Administrative Register	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2022, the Secretary of State published MAR Notice No. 44-2-262 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1653 of the 2022 Montana Administrative Register, Issue Number 15.

2. The Secretary of State has amended the above-stated rule as proposed.

3. No comments or testimony were received.

/s/ AUSTIN MARKUS JAMES	/s/ CHRISTI JACOBSEN
Austin Markus James	Christi Jacobsen
Rule Reviewer	Secretary of State

Dated this 13th day of September, 2022.

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Economic Affairs Interim Committee:

- Department of Agriculture;
- Department of Commerce;
- Department of Labor and Industry;
- Department of Livestock;
- Office of the State Auditor and Insurance Commissioner; and
- Office of Economic Development.

Education and Local Government Interim Committee:

- State Board of Education;
- Board of Public Education;
- Board of Regents of Higher Education; and
- Office of Public Instruction.

Children, Families, Health, and Human Services Interim Committee:

- Department of Public Health and Human Services.

Law and Justice Interim Committee:

- Department of Corrections; and
- Department of Justice.

Energy and Telecommunications Interim Committee:

- Department of Public Service Regulation.

Revenue and Transportation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration and Veterans' Affairs Interim Committee:

- Department of Administration;
- Department of Military Affairs; and
- Office of the Secretary of State.

Environmental Quality Council:

- Department of Environmental Quality;
- Department of Fish, Wildlife and Parks; and
- Department of Natural Resources and Conservation.

Water Policy Interim Committee (where the primary concern is the quality or quantity of water):

- Department of Environmental Quality;
- Department of Fish, Wildlife and Parks; and
- Department of Natural Resources and Conservation.

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is P.O. Box 201706, Helena, MT 59620-1706.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions:

Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR or Register) is an online publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the Attorney General (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding Register.

Use of the Administrative Rules of Montana (ARM):

Known Subject

1. Consult ARM Topical Index.
   Update the rule by checking recent rulemaking and the table of contents in the last Montana Administrative Register issued.

Statute

2. Go to cross reference table at end of each number and title which lists MCA section numbers and department corresponding ARM rule numbers.

RECENT RULEMAKING BY AGENCY

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 2022. This table includes notices in which those rules adopted during the period March 25, 2022, through September 9, 2022, occurred and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 2022, this table, and the table of contents of this issue of the Register.

This table indicates the department name, title number, notice numbers in ascending order, the subject matter of the notice, and the page number(s) at which the notice is published in the 2022 Montana Administrative Register.

To aid the user, this table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

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EXECUTIVE BRANCH APPOINTEES AND VACANCIES

Section 2-15-108, MCA, passed by the 1991 Legislature, directed that all appointing authorities of all appointive boards, commissions, committees, and councils of state government take positive action to attain gender balance and proportional representation of minority residents to the greatest extent possible.

One directive of 2-15-108, MCA, is that the Secretary of State publish monthly in the ***Montana Administrative Register*** a list of executive branch appointees and upcoming vacancies on those boards and councils.

In this issue, appointments effective in August 2022 appear. Potential vacancies from October 1, 2022 through October 31, 2022, are also listed.

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of September 1, 2022.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

EXECUTIVE BRANCH APPOINTEES FOR AUGUST 2022

Appointee	Appointed By	Succeeds	Appointment/End Date
Board of Professional Engineers and Professional Land Surveyors			
Mr. Pat Goodover II	Governor	Tracy Worley	8/1/2022
Great Falls			7/1/2026
Qualifications (if required): Public Member			
Mr. Troy Jensen	Governor	Reappointed	8/1/2022
Sidney			7/1/2026
Qualifications (if required): Public Member			
Board of Water Well Contractors			
Mr. Will Hayes	Governor	Pat Byrne	8/1/2022
Livingston			7/1/2025
Qualifications (if required): Water Well Contractor			
Montana Agriculture Development Council			
Ms. Sara Hollenbeck	Governor	Amy Kellog	8/1/2022
Molt			7/1/2025
Qualifications (if required): Public member who was or is actively engaged in agriculture			
Mr. John Wicks	Governor	Reappointed	8/1/2022
Ledger			7/1/2025
Qualifications (if required): Public member who was or is involved in agriculture			

EXECUTIVE BRANCH VACANCIES – OCTOBER 1, 2022 THROUGH OCTOBER 31, 2022

Board/Current Position Holder	Appointed By	Term End
Board of Barbers and Cosmetologists		
Ms. Angela Printz, Livingston	Governor	10/1/2022
Qualifications (if required): Cosmetologist		
Mr. Bryan Kirkland, Bozeman	Governor	10/1/2022
Qualifications (if required): Barber		
Board of Outfitters		
Mr. Todd Clifford Earp, Corvallis	Governor	10/1/2022
Qualifications (if required): Outfitters licensed to provide big game hunting services		
State Historical Preservation Review Board		
Dr. Cynthia Riley Auge, Missoula	Governor	10/1/2022
Qualifications (if required): History Professional (Historical Researcher)		
Mr. Marvin Keller, Billings	Governor	10/1/2022
Qualifications (if required): History Professional (Historic Preservation)		
State Rehabilitation Council		
Ms. Kathy Jean Hampton, Helena	Governor	10/1/2022
Qualifications (if required): Client assistance program		
Ms. Barbara Louise Davis, Missoula	Governor	10/1/2022
Qualifications (if required): Statewide Independent Living Council Representative		

EXECUTIVE BRANCH VACANCIES – OCTOBER 1, 2022 THROUGH OCTOBER 31, 2022

Board/Current Position Holder	Appointed By	Term End
State Rehabilitation Council Cont.		
Mr. Dale Thomas Kimmet, Helena	Governor	10/1/2022
Qualifications (if required): Office of Public Instruction Representative		
Ms. Marcy Rae Roberts, Kalispell	Governor	10/1/2022
Qualifications (if required): Community rehabilitation program		
Ms. Sandra Lynne Taylor, Billings	Governor	10/1/2022
Qualifications (if required): Parent Training and Information Center		
Water and Wastewater Operators' Advisory Council		
Mr. John Alston, Bozeman	Governor	10/1/2022
Qualifications (if required): Representative of municipality that is required to employ a certified operator		

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